No. 15-1439	
Title:	**Cyan, Inc., et al., Petitioners** **v.** **Beaver County Employees Retirement Fund, et al.**
Docketed:	May 27, 2016
Lower Ct:	Court of Appeal of California, First Appellate District
Case Numbers:	(A146891)
Decision Date:	December 10, 2015
Discretionary Court Decision Date:	February 24, 2016
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
May 24 2016	Petition for a writ of certiorari filed. (Response due June 27, 2016)
Jun 17 2016	Waiver of right of respondents Beaver County Employees Retirement Fund, et al. to respond filed.
Jun 27 2016	Brief amici curiae of Securities Industry and Financial Markets Association, et al. filed. (Distributed)
Jun 27 2016	Brief amici curiae of Law Professors, Elizabeth Cosenza, et al. filed. (Distributed)
Jun 29 2016	DISTRIBUTED for Conference of September 26, 2016.
Jul 01 2016	Response Requested. (Due August 1, 2016)
Jul 20 2016	Order extending time to file response to petition to and including August 24, 2016.
Aug 24 2016	Brief of respondents Beaver County Employees Retirement Fund, et al. in opposition filed.
Sep 07 2016	DISTRIBUTED for Conference of September 26, 2016.

Sep 08 2016	Reply of petitioners Cyan, Inc., et al. filed. (Distributed)
Oct 03 2016	The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 23 2017	Brief amicus curiae of United States filed.
Jun 05 2017	Supplemental brief of petitioners Cyan, Inc., et al. filed.
Jun 06 2017	DISTRIBUTED for Conference of June 22, 2017.
Jun 06 2017	Supplemental brief of respondents Beaver County Employees Retirement Fund, et al. filed. (Distributed)
Jun 26 2017	DISTRIBUTED for Conference of June 26, 2017.
Jun 27 2017	Petition GRANTED.
Jul 26 2017	Blanket Consent filed by Respondents Beaver County Employees Retirement Fund, et al.
Aug 03 2017	The time to file the joint appendix and petitioners' brief on the merits is extended to and including August 28, 2017.
Aug 03 2017	The time to file respondents' brief on the merits is extended to and including October 13, 2017.
Aug 11 2017	Blanket Consent filed by Petitioners Cyan, Inc., et al.
Aug 28 2017	Brief of petitioners Cyan, Inc., et al. filed.
Aug 28 2017	Joint appendix filed.
Aug 31 2017	Brief amicus curiae of DRI - The Voice of the Defense Bar filed.
Sep 05 2017	Brief amicus curiae of Washington Legal Foundation filed.
Sep 05 2017	Brief amicus curiae of New York Stock Exchange LLC filed.
Sep 05 2017	Brief amici curiae of Securities Industry and Financial Markets Association, et al. filed.

Sep 05 2017	Brief amici curiae of Alibaba Group Holding Limited, et al. filed.
Sep 05 2017	Brief amici curiae of Business Roundtable, et al. filed.
Sep 05 2017	Brief amici curiae of Former SEC Commissioners filed.
Sep 05 2017	Brief amici curiae of Law Professors filed.
Oct 06 2017	SET FOR ARGUMENT ON Tuesday, November 28, 2017.
Oct 13 2017	Brief of respondents Beaver County Employees Retirement Fund, et al. filed.
Oct 18 2017	Record requested from the Court of Appeal of California First Appellate District.
Oct 18 2017	Record received from the Superior Court of California County of San Francisco. (1Box).
Oct 19 2017	CIRCULATED
Oct 19 2017	Brief amicus curiae of United States filed. (Distributed)
Oct 20 2017	Brief amici curiae of Institutional Investors filed. (Distributed)
Oct 20 2017	Brief amici curiae of Federal Jurisdiction and Securities Law Scholars filed. (Distributed)
Oct 20 2017	Brief amicus curiae of Public Citizen, Inc. filed. (Distributed)
Oct 20 2017	Brief amicus curiae of Los Angeles County Employees Retirement Association filed. (Distributed)
Oct 20 2017	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Nov 06 2017	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. IN PART, and the time is to be divided as follows: 30 minutes for petitioners, 25 minutes for respondents, and 10 minutes for the Solicitor General.
Nov 09 2017	Record received from the Court of Appeal of California First Appellate District Division. (1 envelope), also part of the record is electronic.

Nov 13 2017	Reply of petitioners Cyan, Inc., et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 22 2017	Supplemental brief of respondents Beaver County Employees Retirement Fund, et al. filed.(Distributed)
Nov 27 2017	Motion of petitioners to strike the supplemental brief of respondents filed. **Main Document**
Nov 27 2017	Supplemental Brief of Cyan, Inc., et al. not accepted for filing. (January 08, 2018)
Nov 28 2017	Argued. For petitioners: Neal K. Katyal, Washington, D. C. For United States, as amicus curiae, in support of affirmance: Allon Kedem, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For respondents: Thomas C. Goldstein, Bethesda, Md.
Jan 08 2018	Motion of petitioners to strike the supplemental brief of respondents is GRANTED.

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RECORD AND BRIEFS

No. 15-1439

Supreme Court, U.S. FILED MAY 24 2016 OFFICE OF THE CLERK

In The Supreme Court of the United States

CYAN, INC., et al.,

Petitioners,

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Superior Court Of The State Of California For The County Of San Francisco

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

To curb abusive class-action litigation concerning nationally traded securities, the Private Securities Litigation Reform Act of 1995 ("Reform Act") amended federal securities laws to impose new requirements, including fee limitations, selection criteria for lead plaintiffs, and an automatic stay of discovery pending any motion to dismiss. To prevent plaintiffs from filing class actions in state court and thereby sidestepping the Reform Act, the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") *inter alia* amended the Securities Act of 1933 ("'33 Act") to provide that concurrent state-court subject matter jurisdiction over '33 Act claims will continue "except as provided in [Section 16 of the '33 Act] with respect to covered class actions." Section 16, as amended by SLUSA, defines "covered class action" as any damages action on behalf of more than 50 people. This case is undisputedly a "covered class action."

Section 16, as amended by SLUSA, also precludes covered class actions alleging state-law securities claims and permits precluded actions to be removed to and dismissed in federal court. No state-law claims were alleged in this case.

The question presented – which has split federal district courts in removal cases and thus sidelined federal appeals courts – is:

Whether state courts lack subject matter jurisdiction over covered class actions that allege only '33 Act claims.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners in this Court, who were defendants in the Superior Court of California, County of San Francisco ("Superior Court"), and petitioners in both the Court of Appeal of the State of California, First Appellate District ("Court of Appeal, First District"), and the Supreme Court of California, are Cyan, Inc., Mark A. Floyd, Michael W. Zellner, Michael L. Hatfield, Paul A. Ferris, Promod Haque, M. Niel Ransom, Michael J. Boustridge, and Robert E. Switz ("Petitioners"). Additional defendants in the Superior Court, who are not parties here and who were not parties in either the Court of Appeal, First District, or the Supreme Court of California, were Goldman Sachs & Co., J.P. Morgan Securities LLC, Jefferies LLC, and Pacific Crest Securities LLC. Respondents in this Court, who were plaintiffs in the Superior Court and real parties in interest in both the Court of Appeal, First District, and the Supreme Court of California, are Beaver County Employees Retirement Fund, Retirement Board of Allegheny County, Delaware County Employees Retirement System, and Jennifer Fleischer. The Superior Court, which is not a party here, was Respondent in both the Court of Appeal, First District, and the Supreme Court of California.

Pursuant to Supreme Court Rule 29.6, Petitioners disclose as follows: Cyan, Inc. was a publicly held company when this action was filed. On August 3, 2015,

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT – Continued

- Cyan, Inc. was acquired by Ciena Corporation, a publicly held company, and has since ceased to exist as a corporate entity. Other than Ciena Corporation, there is no parent or publicly held company owning 10% or more of Cyan, Inc.'s stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the Superior Court's order denying Petitioners' motion for judgment on the pleadings, which motion contended that the Superior Court lacked jurisdiction over the subject matter of the action. Petitioners' petition for writ of mandate and/or prohibition or other relief was denied by the Court of Appeal, First District. Petitioners' petition for review was denied by the Supreme Court of California.

INTRODUCTION

Chaos has resulted from the lower courts' efforts to resolve the jurisdictional question presented. The importance of that question, which concerns the integrity of national securities markets, "cannot be overstated." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 78 (2006). This Court should accordingly grant certiorari.

The Reform Act implemented reforms to curb abusive securit s class actions, which Congress determined to be ha ming the nation's economy. Unfortunately, many of the reforms are inapplicable in state court. To prevent state-court litigation from circumventing the Reform Act, SLUSA *inter alia* withdrew state courts' concurrent jurisdiction over class actions alleging '33 Act claims. The decision below, however, misreads SLUSA as continuing, rather than withdrawing, such state-court jurisdiction. Thus, that decision

subverts SLUSA's requirement that the reforms have uniform application in all class actions under the '33 Act. Courts have called the result "bizarre," "absurd," and "directly contrary to the stated intent of Congress."

The question presented -- which has split lower courts – arises in two contexts. In the first, a plaintiff who brought a state-court class action alleging only '33 Act claims moves a federal court, after removal, to remand the case to state court. Some 55 decisions of federal district courts have arisen in this context, with more decisions expected. Almost all of these holdings address, but are divided over, the issue of whether the state court had subject matter jurisdiction. In the second context, a defendant in a state-court class action alleging only '33 Act claims moves the state court to dismiss for lack of subject matter jurisdiction. In this second category are five decisions, consisting of *Luther v. Countrywide Financial Corp.*, 195 Cal. App. 4th 789 (2011) ("*Countrywide*"), and four decisions of California trial courts, including the decision below. All five decisions held, incorrectly, that SLUSA continued state-court jurisdiction over class actions under the '33 Act. Plaintiffs have taken note of this revived opportunity to circumvent the Reform Act: since *Countrywide*, filings of '33 Act class actions in California state courts have risen 1400 percent.

The nation's appellate courts are unlikely to resolve the conflict and obviate the need for this Court's review. Federal appeals courts are silent because of the procedural roadblocks to review of remand decisions.

State appeals courts have produced only one decision – *Countrywide* – and are unlikely to produce more.

This petition provides a rare opportunity to turn chaos into order and prevent circumvention of the Reform Act. The Court has jurisdiction to grant certiorari here. The question presented was squarely raised below and was decided on purely federal grounds, and reversal by this Court will terminate the case. The absence of appellate guidance has left lower courts in disarray. Postponing review will only add to the lower courts' confusion, without increasing the prospect of a better opportunity for review. Postponing review will also erode the federal policy – clearly set forth in SLUSA – of providing exclusive federal jurisdiction over class actions under the '33 Act. Certiorari should therefore be granted.

OPINIONS BELOW

The order of the Superior Court adopting its tentative ruling and denying Petitioners' motion for judgment on the pleadings is unreported, but is reprinted at 1a-2a. (References to the Appendix to the petition are in the form "__a.") The transcript of the tentative ruling is reprinted at 3a-14a. The order of the Court of Appeal, First District, denying Petitioners' petition for writ of mandate and/or prohibition or other relief is unreported, but is reprinted at 15a. The order of the Supreme Court of California denying Petitioners' petition for review is unreported, but is reprinted at 16a.

JURISDICTION

Petitioners' motion for judgment on the pleadings for lack of subject matter jurisdiction, filed with the Superior Court on August 25, 2015, was denied on October 23, 2015. 1a. A petition for writ of mandate and/or prohibition or other relief, filed with the Court of Appeal, First District, on December 2, 2015, was denied on December 10, 2015. 15a, 32a. A petition for review, filed with the Supreme Court of California on December 18, 2015, was denied on February 24, 2016. 16a, 35a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

Relevant provisions of the '33 Act, as amended by SLUSA, are reprinted at 17a-24a.

STATEMENT OF THE CASE

A. Statutory Framework

1. In the '33 Act, Congress created several causes of action for a false statement made in connection with a public offering of securities. Section 11 creates liability for a false registration statement. 15 U.S.C. § 77k. Section 12(a)(2) creates liability for a false prospectus. 15 U.S.C. § 77l(a)(2). Section 15 creates liability for persons who control those liable under Sections 11 or 12. 15 U.S.C. § 77o. Liability under Section 11

is strict; there is no scienter requirement.[1] Until SLUSA's enactment in 1998, Section 22 gave federal and state courts concurrent subject matter jurisdiction over '33 Act claims and barred removal to federal court of '33 Act claims that were filed in a state court of "competent jurisdiction." 15 U.S.C. § 77v(a).[2]

2. In 1995, Congress found that abusive class-action securities litigation was harming "the entire U.S. economy." *Dabit*, 547 U.S. at 81 (quoting H.R. Conf. Rep. No. 104-369, 1st Sess., at 31 (1995)); *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 636 (2006). The abuses included "nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and 'manipulation by class action lawyers of the clients whom they purportedly represent.'" *Dabit*, 547 U.S. at 81 (citation omitted). The harms to the national economy included "extortionate settlements" and "deter[rence of] qualified individuals from serving on boards of directors." *Id.* To curb the abuses, Congress passed the Reform Act. As relevant here, the reforms included fee limitations, selection criteria for lead

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[1] *See, e.g., Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1331 n.11 (2015).

[2] By contrast, the Securities Exchange Act of 1934 ("'34 Act") has been read to create a cause of action for fraud in connection with the purchase or sale of securities. *See* '34 Act § 10(b); SEC Rule 10b-5, 17 C.F.R. § 240.10b-5. Liability under the '34 Act is not limited to public offerings. *Superintendent of Ins. of State of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 10 (1971). Liability is not strict; scienter is required. *Merck & Co. v. Reynolds*, 559 U.S. 633, 648-49 (2010). Federal courts have exclusive jurisdiction over '34 Act claims. 15 U.S.C. § 78aa(a).

plaintiffs, and an automatic stay of discovery pending any motion to dismiss. *See* 15 U.S.C. § 77z-1; *Dabit*, 547 U.S. at 81.

An "unintended consequence" of the Reform Act was to prompt plaintiffs to file securities class actions in state court. *Dabit*, 547 U.S. at 82. Many of the reforms do not apply in state court. H.R. Conf. Rep. No. 105-803, 2d Sess. (1998) ("SLUSA Conf. Rep.") at 14-15. As Congress found, class actions alleging state-law securities claims were increasingly filed in state court after the Reform Act. *Dabit*, 547 U.S. at 82. Nationwide, the number of such filings doubled.[3]

As the language and structure of SLUSA would make clear, Congress was also concerned that, because of both concurrent state-court jurisdiction over '33 Act claims and the '33 Act's removal bar, state-court class actions alleging '33 Act claims would become another means of circumventing the Reform Act.

3. SLUSA was enacted in 1998 to prevent circumvention of the Reform Act.

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[3] *See Report to the President and the Congress on the First Year of Practice under the Private Securities Litigation Reform Act of 1995*, Securities & Exchange Commission (Apr. 1, 1997), at 27-28 ("78 cases had been filed in the first ten months of 1996 (for an annualized total of 94), as compared to 48 for the previous year."), *cited in Diamond Multimedia Sys., Inc. v. Superior Court*, 19 Cal. 4th 1036, 1045 n.10 (1999). In the state courts of California – whose Silicon Valley spawns many initial public offerings ("IPOs") – filings of securities class actions rose fivefold after the Reform Act. SLUSA Conf. Rep. at 15.

As argued more fully below, *infra* at 25-36, SLUSA eliminated state-court jurisdiction over class actions alleging '33 Act claims. 15 U.S.C. § 77v. It did so by adding the italicized language to Section 22(a) of the '33 Act: "The district courts of the United States . . . shall have jurisdiction of offenses and violations under this subchapter . . . , and, concurrent with State and Territorial courts, *except as provided in [Section 16] of this title with respect to covered class actions*, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter." 15 U.S.C. § 77v(a) (emphasis added). Section 16, as amended by SLUSA, defines "covered class action" as any damages action on behalf of more than 50 people. 15 U.S.C. § 77p(f)(2). By adding new Sections 16(b) and 16(c) to the '33 Act, SLUSA also precluded covered class actions alleging state-law securities claims, *see* 15 U.S.C. § 77p(b), and permitted such precluded actions to be removed to and dismissed in federal court, *see id.* § 77p(c).[4] Finally, SLUSA conformed the '33 Act's removal bar to the new Section 16(c), 15 U.S.C. § 77p(c), by adding the italicized language to Section 22(a) of the '33 Act: "*Except as provided in [Section 16(c)] of this title*, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States." 15 U.S.C. § 77v(a) (emphasis added). After SLUSA, state

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[4] In addition to defining "covered class action" in subsection (f)(2) and setting forth the preclusion and removal provisions in subsections (b) and (c), Section 16 contains a "General Reservation of Rights" (16(a)) and preserves certain state-law claims and state enforcement actions (Sections 16(d)-(e)). 15 U.S.C. § 77p.

courts retain concurrent jurisdiction over '33 Act claims brought in individual actions (*i.e.*, in non-"covered class actions"), which were not found by Congress to be harming the national economy. *See Dabit*, 547 U.S. at 81; *Kircher*, 547 U.S. at 636.

As also argued more fully below, because SLUSA eliminated state-court jurisdiction over covered class actions alleging '33 Act claims, state courts are no longer courts of "competent jurisdiction" for purposes of the '33 Act's removal bar. *See infra* pp. 31-33. Thus, notwithstanding that bar, covered class actions alleging '33 Act claims may be removed to federal court under the federal-question removal provision, 28 U.S.C. § 1441(a). *See id.*

4. Notwithstanding SLUSA's plain command and the holdings of numerous federal district courts, other federal district courts – along with the court below and a California intermediate appellate court in *Countrywide* – have held that state courts retain jurisdiction over covered class actions alleging only '33 Act claims.

Since *Countrywide* was issued, state-court filings of class actions alleging '33 Act claims have significantly increased. In California state courts, such filings have spiked by 1400 percent.[5]

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[5] In the 12 years between SLUSA and *Countrywide*, only 6 class actions alleging Section 11 claims were filed in California state courts – an average of *one case every two years*. In the 5 years after *Countrywide*, at least 38 class actions alleging Section 11 claims were filed in California state courts – an average of *more*

B. Respondents' Class-Action Complaint Under the '33 Act

On May 9, 2013, Cyan filed its IPO. Its stock began to trade on the New York Stock Exchange, a national securities exchange. Following an announcement of weaker-than-expected results, shareholders sued. A Consolidated Complaint (the "Complaint") was filed in the Superior Court on June 13, 2014. Respondents did not dispute below that this case is a "covered class action."[6] Respondents also did not dispute below that the Cyan IPO stock at issue was listed on the New York Stock Exchange; thus, that stock is a "covered security."[7]

The Complaint is brought as a class action on behalf of purchasers of Cyan's IPO stock. Plaintiffs seek to pursue strict liability remedies under the '33 Act. All claims are pursuant to Sections 11, 12(a)(2), and 15 of the '33 Act (15 U.S.C. §§ 77k, 77l(a)(2), and 77o). The Complaint alleges no state-law claims.

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than seven cases every year. Fourteen were filed in 2015 alone. *See* Appendix I.

[6] *See* '33 Act § 16(f)(2) (defining "covered class action" as any damages action on behalf of more than 50 people), 15 U.S.C. § 77p(f)(2).

[7] *See* '33 Act § 16(f)(3) (incorporating Section 18(b)'s definition of "covered security"), § 18(b) (defining "covered security" as any security listed on New York Stock Exchange), 15 U.S.C. §§ 77p(f)(3), 77r(b).

C. Petitioners' Motion for Judgment on the Pleadings, the Superior Court's Denial, and the Orders Denying Review

Because SLUSA eliminated state-court jurisdiction over covered class actions alleging only '33 Act claims, Petitioners moved on August 25, 2015, for judgment on the pleadings for lack of subject matter jurisdiction. On October 23, 2015, the Superior Court denied the Motion, explaining that its "hands are tied by" *Countrywide*. 1a, 5a-6a. The Superior Court added that it had no legal analysis to offer beyond that in *Countrywide*. 5a-6a.

On December 2, 2015, Petitioners challenged the Order in a petition for writ relief filed with the Court of Appeal, First District. 32a. On December 10, 2015, the petition was denied without opinion. 15a. On December 18, 2015, Petitioners filed a petition for review with the Supreme Court of California. 35a. On February 24, 2016, the petition was denied without opinion. 16a. This timely petition followed.

REASONS FOR GRANTING THE PETITION

A petition for a writ of certiorari may be granted where "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court." SUP. CT. R. 10(c). This case meets that criterion.

Federal district courts in removal cases have divided bitterly over the question presented. Because of the procedural roadblocks to review of remand orders, federal appeals courts are unlikely to rule on, let alone resolve, the conflict. Absent this Court's guidance, the district courts will remain in disarray with no end in sight.

The question presented is important and was wrongly decided by the Superior Court. SLUSA was designed to prevent state-court class actions from circumventing the Reform Act. Yet, in holding that state courts have concurrent jurisdiction in cases such as this, the Superior Court has endorsed the forum-shopping that SLUSA was intended to stop. The Superior Court's reasoning – which simply adopted that of *Countrywide* – violated basic norms of statutory interpretation: it rendered a key SLUSA provision surplusage, while attributing to Congress the irrational intent to withdraw state-court jurisdiction over state-law, but not federal-law, claims.

The Court now has a rare opportunity to provide urgently needed clarification of SLUSA's jurisdictional provisions.

A. To End the Chaos in the Lower Courts, This Court Should Settle the Question Presented

1. Dozens of federal district court decisions have split on the question presented, with 39 holding that

state courts have subject matter jurisdiction[8] and 10 holding that state courts lack subject matter jurisdiction.[9] The numbers on each side are steadily rising.[10] Conflicts have arisen not only between district courts in the same circuit[11] but also between district judges of the same district[12] and even between decisions of the

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[8] The decisions are listed in Appendix F.

[9] The decisions are listed in Appendix G. In six other cases, the district court denied remand, but the court did not determine whether the state court lacked subject matter jurisdiction. The decisions are listed in Appendix H.

[10] Since January 1, 2015, sixteen federal district courts have issued conflicting decisions on the question presented. *See supra* notes 8 & 9; Appendices F & G.

[11] *Compare, e.g.*, *Wunsch v. Am. Realty Capital Props.*, 2015 U.S. Dist. LEXIS 48759 (D. Md. Apr. 14, 2015), *with Niitsoo v. Alpha Natural Res., Inc.*, 902 F. Supp. 2d 797 (S.D. W. Va. 2012); *compare, e.g.*, *In re King Pharms., Inc.*, 230 F.R.D. 503 (E.D. Tenn. 2004), *with Rosenberg v. Cliffs Natural Res., Inc.*, 2015 U.S. Dist. LEXIS 48915 (N.D. Ohio Mar. 25, 2015); *see also infra* note 12.

[12] *Compare Lapin v. Facebook, Inc.*, 2012 U.S. Dist. LEXIS 119924 (N.D. Cal. Aug. 23, 2012), *with Electrical Workers Local #357 Pension and Health & Welfare Trusts v. Clovis Oncology, Inc.*, 2016 WL 2592947 (N.D. Cal. May 5, 2016); *compare Rubin v. Pixelplus Co.*, 2007 WL 778485 (E.D.N.Y. Mar. 13, 2007), *with Bernd Bildstein IRRA v. Lazard Ltd.*, 2006 WL 2375472 (E.D.N.Y. Aug. 14, 2006).

same district judge.[13] Removal to federal court is blessed here[14] yet sanctioned there.[15]

Federal appeals courts have provided no guidance and are unlikely to do so in the future. Orders granting remand are, with irrelevant exceptions, unreviewable.[16]

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[13] *See W. Va. Laborers Trust Fund v. STEC Inc.*, 2011 U.S. Dist. LEXIS 146846, at *11 n.4 (C.D. Cal. Oct. 7, 2011) (noting that same judge issued contradictory holdings in *Purowitz v. DreamWorks Animation SKG, Inc.*, 2005 U.S. Dist. LEXIS 46911 (C.D. Cal. Nov. 14, 2005), and *Layne v. Countrywide Fin. Corp.*, 2008 U.S. Dist. LEXIS 123896 (C.D. Cal. July 8, 2008)); *see also In re Waste Mgmt. Inc. Sec. Litig.*, 194 F. Supp. 2d 590, 591 (S.D. Tex. 2002) ("In its last order (# 49), this Court denied Plaintiffs' motion to remand under 28 U.S.C. § 1447(c). Since then the Court has continued to mull over what appears to be a case of first impression, has reconsidered its ruling, and has concluded after all that removal under SLUSA was improper and that this case should be remanded.").

[14] *See supra* at 12 & note 9; Appendix G.

[15] *See Iron Workers Mid-South Pension Fund v. Terraform Global, Inc.*, 2016 WL 827374, at *1-6 (N.D. Cal. Mar. 3, 2016) (holding removal improper, granting remand, and awarding plaintiff attorney's fees and expenses).

[16] *See* 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . . "); *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 234 (2007) (holding appellate review of remand order barred by § 1447(d)); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127, 129 (1995) (same); *see also Kircher*, 547 U.S. at 640 (noting irrelevant exceptions to § 1447(d)'s review bar). The class-action exception to § 1447(d)'s review bar, *see* 28 U.S.C. § 1453(c), is inapplicable where, as here, a class action involves only claims concerning a "covered security" as defined in Section 16(f)(3) of the '33 Act. *See* 28 U.S.C. § 1453(d)(1); *supra* at 9 (noting that Cyan stock is "covered security").

Orders denying remand are non-final and thus are appealable only after final judgment.[17] The pool of final judgments that survive to appellate decision is limited, given the high settlement amounts that defendants are willing to pay in even weak securities cases.[18] Discretionary interlocutory review under 28 U.S.C.

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[17] *See Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574, 578 (1954); *Estate of Bishop v. Bechtel Power Corp.*, 905 F.2d 1272, 1274-75 (9th Cir. 1990).

[18] *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975) ("[I]n the field of federal securities laws governing disclosure of information even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment.").

§ 1292(b) is unavailable for orders granting remand[19] and is disfavored for orders denying remand.[20]

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[19] *Williams v. AFC Enters., Inc.*, 389 F.3d 1185, 1191 (11th Cir. 2004) (holding that, where district court entered order granting remand of '33 Act class action under SLUSA, § 1447(d) bars review of remand order under 28 U.S.C. § 1292(b)); *see generally In re WTC Disaster Site*, 414 F.3d 352, 371 (2d Cir. 2005) (holding that, where district court entered order granting remand for lack of federal jurisdiction, § 1447(d) bars review of remand order under 28 U.S.C. § 1292(b)); *Feidt v. Owens Corning Fiberglas Corp.*, 153 F.3d 124, 126-27 (3d Cir. 1998) (same); *Krangel v. General Dynamics Corp.*, 968 F.2d 914, 914 (9th Cir. 1992) (same); *Fed. Sav. & Loan Ins. Corp. v. Frumenti Dev. Corp.*, 857 F.2d 665, 671 (9th Cir. 1988). Although in *Luther v. Countrywide Home Loans Servicing LP*, 533 F.3d 1031, 1033 (9th Cir. 2008), the Ninth Circuit held that 28 U.S.C. § 1453(c) authorized appeal of an order granting remand of a class action brought under the '33 Act, the Ninth Circuit's decision does not address § 1453(d)(1). Because the security at issue there was not a "covered security" under Section 16(f)(3) of the '33 Act, *see* 533 F.3d at 1033 n.1, it is clear that § 1453(d)(1) was not applicable and thus did not prevent appeal of the remand order in that case.

[20] *See Carducci v. Aetna U.S. Healthcare*, 2002 WL 31262100, at *3 (D.N.J. July 24, 2002) (denying § 1292(b) certification for order denying remand); *Binkley v. Loughran*, 714 F. Supp. 774, 775-76 (M.D.N.C. 1989) (same), *aff'd mem.*, 940 F.2d 651 (4th Cir. 1991); *see also Ingram v. Union Carbide Corp.*, 34 F. App'x 152 (5th Cir. 2002) (dismissing appeal of order denying remand because of non-compliance with § 1292(b)); *Aucoin v. Matador Servs., Inc.*, 749 F.2d 1180, 1181 (5th Cir. 1985) (same); *see generally Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74 (1996) (Congress intended to reserve § 1292(b) review for "exceptional" cases (citations omitted)); *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010) (§ 1292(b) is a "narrow exception to the final judgment rule"; "the party pursuing the interlocutory appeal bears the burden of" demonstrating that "the certification requirements of the statute have been met"; "[c]ertification under § 1292(b) requires the district court to expressly find in writing that all three § 1292(b) requirements are

State courts have produced only one appellate decision on the issue – *Countrywide* – and are unlikely to produce additional decisions, for several reasons. First, discretionary interlocutory review is as disfavored under state law as it is under 28 U.S.C. § 1292(b). Petitioner's petitions for such review were both denied. *See supra* at 10. Second, the likelihood of settlement, *see supra* at 14, similarly limits the number of state-court judgments that result in appellate decision. Third, *Countrywide* has effectively barred all California state trial courts from entering jurisdictional dismissals and thus has foreclosed consequent non-interlocutory – *i.e.*, procedurally unobstructed – appeals. Under California law, a decision by a California Court of Appeal for one appellate district is binding on *all* California trial courts, even those lying within a *different* appellate district.[21] This case is an example: the Superior Court held that it was bound by *Countrywide*, even though the Superior Court lies within a different appellate district from the *Countrywide* court. 1a. Finally, federal district court decisions denying remand[22] have inherently reduced state-court litigation of the question presented.

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met."; concluding that the statutory requirements were not met (citing cases)). The authorization for interlocutory review of orders denying remand of class actions, *see* 28 U.S.C. § 1453(c), is inapplicable here for the same reasons that § 1453(c)'s exception to § 1447(d)'s review bar is inapplicable here. *See supra* note 16.

[21] *Cuccia v. Superior Court*, 153 Cal. App. 4th 347, 353 (2007) (citing *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 455 (1962)).

[22] *See supra* note 9; Appendices G & H.

The disarray in the lower courts and the lack of appellate guidance strongly favor a grant of certiorari.

2. This petition presents a rare opportunity for this Court to resolve the chaos.

a. Although merits litigation is ongoing in the Superior Court, this Court has jurisdiction to grant certiorari under 28 U.S.C. § 1257(a).[23]

The Superior Court's order is a "[f]inal judgment[]" under § 1257. The jurisdictional issue was "a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 558 (1963) (state-court decision rejecting claim that federal statute required suit to have been brought in different court was "final" under § 1257 despite ongoing merits litigation in state court). It "serves the policy underlying" the finality requirement for this Court now to resolve the jurisdictional question "rather than to subject [the parties] to long and complex litigation which may all be for naught." *Id.*[24] Moreover, postponing review

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[23] Section 1257(a) provides: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any title, right, privilege, or immunity is specially set up or claimed under the . . . statutes of . . . the United States."

[24] *See Construction & Gen. Laborers' Union v. Curry* ("*Curry*"), 371 U.S. 542, 549 (1963) (holding that question of state court's jurisdiction to enter temporary injunction against labor picketing was "final and reviewable" under § 1257 because it falls "in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important

here would erode SLUSA's policy of requiring the '33 Act claims in this "covered class action" to be litigated exclusively in federal court and thereby preventing circumvention of the Reform Act. *See Curry*, 371 U.S. at 550.

The Superior Court's order was also rendered by the "highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). This requirement of § 1257(a) was satisfied because petitions for review of the Superior Court's order were denied by both levels

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to be denied review and *too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.*" (emphasis added; citation omitted)); *id.* at 553 (noting that Court was granting review under § 1257 even though "the [jurisdictional] question now raised would be merged in the final judgment and would be open to review by this Court at that time" (Harlan, J., concurring)); *see also Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) ("state-court decisions rejecting a party's federal-law claim that he is not subject to suit before a particular tribunal are 'final' for purposes of our certiorari jurisdiction under 28 U.S.C. § 1257").

of California's appellate courts.[25] Thus, the reviewable judgment is that of the Superior Court.[26]

Finally, a title, right, privilege, or immunity is claimed under a federal statute here. Petitioners' motion for judgment on the pleadings claimed that SLUSA gave Petitioners a right to a federal forum and immunized Petitioners from having to litigate this case in state court. Moreover, by adopting *Countrywide*'s interpretation of SLUSA, the Superior Court resolved

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[25] *See, e.g.*, *Virginian Ry. Co. v. Mullens*, 271 U.S. 220, 222 (1926) ("the Supreme Court of Appeals of the State, although petitioned by the defendant to review the [trial court] judgment, declined so to do, thus making the trial court the highest court of the State in which a decision could be had."); Stephen M. Shapiro et al., SUPREME COURT PRACTICE (10th ed. 2013) ("SHAPIRO") at 177 ("If the appellate court declines to review the case, the trial court's judgment becomes that of the highest court in which decision could be had[,] [citations omitted], although the time for filing a petition for certiorari runs from the date of the higher court's refusal to review."); *see also Am. Ry. Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923) (where state's highest court has jurisdiction to grant discretionary review of lower court judgment, "it [i]s necessary for the petitioner to invoke that [discretionary] jurisdiction in order to make it certain that the case could go no farther," but "when the jurisdiction was declined[, the intermediate appellate court] was shown to be the highest Court of the State in which a decision could be had" (citations omitted)); SHAPIRO at 176 n.46 (collecting cases).

[26] *See, e.g.*, *In re Little*, 404 U.S. 553, 553 (1972) (granting petition for certiorari and reversing judgment of Superior Court after both North Carolina Court of Appeals and North Carolina Supreme Court denied review); *see* SHAPIRO at 180 ("An order of a court of last resort declining to review a case is not ordinarily the judgment that is reviewable under § 1257(a); in that event, the reviewable judgment is that of the highest court possessing and exercising jurisdiction.").

this case on a purely federal ground. *See Sears v. Upton*, 561 U.S. 945, 946 n.1 (2010) (state-court decision confers jurisdiction under § 1257 if "it resolved a federal issue on exclusively federal-law grounds").[27]

b. There is no benefit to waiting for federal or state appeals courts to resolve the conflict over the question here presented. Because of the roadblocks to review of remand orders, *see supra* at 13-15, the ordinary process of federal review is exceedingly unlikely to result in any appellate decisions, let alone a uniform line of decisions that will eliminate conflict and obviate the need for review by this Court.[28] State-court litigation is also unlikely to obviate the need for review:

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[27] *See also* SHAPIRO at 153 (requirement is satisfied where case "relat[es] to the construction and application of" federal statutes (citing cases)); *Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 334 (1968) (in determining whether question was "specially set up or claimed" for purposes of § 1257, it is "usually sufficient to ask whether the petitioners satisfied the state rules governing presentation of issues" (Harlan, J., dissenting) (citation omitted)).

[28] Unavailingly, class-action plaintiffs rely on dicta in certain federal appellate decisions. Those decisions are off-point for many reasons, including the fact that they involved only state-law claims and/or analyzed only SLUSA's removal provisions, not SLUSA's amendment to the jurisdictional portion of Section 22(a). *See Proctor v. Vishay Intertechnology, Inc.*, 584 F.3d 1208, 1228 (9th Cir. 2009); *Madden v. Cowen & Co.*, 576 F.3d 957, 976 (9th Cir. 2009); *Luther*, 533 F.3d at 1034; *Herndon v. Equitable Variable Life Ins. Co.*, 325 F.3d 1252, 1253 (11th Cir. 2003); *Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334, 1340-41 (11th Cir. 2002). The Ninth Circuit's decision in *Countrywide* was also off-point because it assumed that SLUSA requires remand and analyzed only whether the Class Action Fairness Act trumps SLUSA.

state cases have resulted in only one appellate decision, for reasons discussed *supra* at 16.

Nor is there any benefit to waiting for this case to proceed through discovery to final judgment. The question presented is purely legal. Only the pleadings are necessary for this Court to resolve it. Discovery and trial will add no clarification to the issues.

While the benefit of waiting for appellate decisions in other cases or for final judgment here is nil, the cost of waiting is high. The number of '33 Act cases brought in state court has spiked since issuance of *Countrywide*[29] – on which the decision below is based, *see* 1a, 5a-6a – and such unabashed forum-shopping shows no sign of abating. The uncertainty and divisions in the federal courts undermine the integrity of the judicial system, as like cases are not being treated alike. In these cases, the deciding factor – as litigants and the public readily perceive – is not a uniform principle of law but rather the particular judge assigned. Moreover, with every passing month absent appellate guidance, SLUSA's intent to give defendants a federal forum will be frustrated. Defendants' corresponding right to a federal forum will similarly be lost.

This case is an ideal vehicle for review. The question presented was squarely raised below. It was decided clearly and exclusively on federal grounds. And a reversal by this Court will terminate the litigation altogether.

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[29] *See supra* at 8.

Petitioners are unaware of any other case on the horizon that will present a better opportunity for resolution of the question presented.

3. In prior cases, a lower-court split prompted a grant of certiorari even absent a Circuit conflict.

Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981), like this case, presented the question whether state courts have concurrent subject matter jurisdiction over an action arising under a federal statute. In *Gulf Offshore*, petitioner had been sued in Texas state court under the federal Outer Continental Shelf Lands Act, 67 Stat. 462 ("OCSLA"). In the trial court, petitioner argued – on summary judgment and at trial – that state courts lack subject matter jurisdiction over OCSLA claims. The trial court rejected the argument. Texas's intermediate appellate court rejected the argument as well. The Texas Supreme Court denied review. This Court granted certiorari to resolve the "conflict over whether federal courts have exclusive subject-matter jurisdiction over suits arising under OCSLA." 453 U.S. at 477. The conflict in both *Gulf Offshore* and this case involved federal district courts and state intermediate appellate courts. But the conflict in *Gulf Offshore* involved only five decisions, *see* 453 U.S. at 477 & n.3; the conflict here involves dozens of decisions.

In *Mistretta v. United States*, 488 U.S. 361 (1989), certiorari was granted in part because of the "disarray among the Federal District Courts." *Id.* at 371 & n.6. There, as here, dozens of district court decisions fell on

either side of the issue, which was the constitutionality of the federal sentencing guidelines.[30] Moreover, certiorari was granted even though federal appellate review was available. If disarray among district courts favored a grant of certiorari there, where federal appellate review was available, then such disarray here – where federal appellate review is largely unavailable – *a fortiori* favors a grant of certiorari.[31]

B. The Jurisdictional Question Is Important and Was Wrongly Decided Below

The holding below – like the holding in *Countrywide* and numerous federal cases – subverts both the Reform Act and SLUSA, to the detriment of national securities markets. Certiorari should be granted to correct those erroneous holdings. This Court's guidance

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[30] *See Mistretta*, 488 U.S. at 371 n.6 (referencing decisions cited by petition for certiorari).

[31] *See also Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 349 & n.2 (1999) (conflict involved three federal appeals courts opposing two federal district courts); *Heffron v. Int'l Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 646 & n.9 (1981) (conflict involved two federal district courts opposing two state supreme courts and three federal appeals courts); *Curtis v. Loether*, 415 U.S. 189, 191 & n.2 (1974) (conflict involved federal district court decision opposing two federal district court decisions and one federal appeals court decision); *cf. Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 179, 185 & n.4 (1980) (noting "no direct conflict" on patent-law issue, but granting certiorari to "forestall a possible conflict in the lower courts").

will vindicate congressional intent to curb abusive securities class actions, to enact uniform rules effectuating those curbs, and to stop forum-shopping.[32]

1. For two reasons, the significant federal interest in curbing abusive securities class actions has been undercut by *Countrywide* and similar federal decisions. First, the national economy is once more subject to the harmful abuses that the Reform Act and SLUSA sought to eradicate. Second, despite SLUSA's intent to create *uniform* standards, there are now disuniform standards, with abuse-curbing rules applying in federal court and abuse-permitting rules applying in state court. The difference incentivizes the forum-shopping that SLUSA sought to eliminate.

"The magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." *Dabit*, 547 U.S. at 78. That significant federal interest prompted Congress in 1995 to find that abusive class-action securities litigation was harming "the entire U.S. economy" and to curb the abuse by passing the Reform Act. *Dabit*, 547 U.S. at 81 (quoting H.R. Conf. Rep. No. 104-369, 1st Sess., at 31 (1995)); *Kircher*, 547 U.S. at 636; *see supra* at 5-6.

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[32] In both jurisdictional and non-jurisdictional cases, this Court has repeatedly granted certiorari in cases concerning construction of the federal securities laws. *See* SHAPIRO at 271 (citing cases).

But the Reform Act inadvertently prompted plaintiffs to "bring[] class actions under state law, often in state court." *Dabit*, 547 U.S. at 82. The migration to state court was marked: the number of state-court class actions alleging securities claims doubled nationally and quintupled in California. *See supra* at 6 & note 3. It was also novel: "state-court litigation of class actions involving nationally traded securities had previously been rare." *Dabit*, 547 U.S. at 82. And it was no coincidence: "[S]ince passage of the Reform Act, plaintiffs' lawyers have *sought to circumvent* the Act's provisions by exploiting differences between Federal and State laws by filing frivolous and speculative lawsuits in State court, *where essentially none of the Reform Act's procedural or substantive protections against abusive suits are available.*" SLUSA Conf. Rep. at 14-15 (emphasis added).[33] "To stem this shift from Federal to State courts" and thus "[t]o block this bypass of the Reform Act," Congress enacted SLUSA. *Dabit*, 547 U.S. at 82 (brackets and internal quotation marks omitted); *Kircher*, 547 U.S. at 636.

SLUSA closed the state-court loophole. Targeting state-court securities class actions regardless of whether they allege federal- or state-law claims, SLUSA (1) eliminated state-court jurisdiction over class actions alleging '33 Act claims and (2) precluded most class actions alleging state-law securities claims.

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[33] The *Diamond* Court recognized that, absent SLUSA, California would provide "a more attractive forum and afford more expansive remedies for market manipulation than does federal securities law." 19 Cal. 4th at 1045.

15 U.S.C. §§ 77v, 77p. SLUSA thereby made federal court the "exclusive venue for most securities class action lawsuits." SLUSA Conf. Rep. at 13.

Thirteen years after SLUSA closed the state-court loophole, *Countrywide* unequivocally reopened it. In *Countrywide*, plaintiff investors filed a state-court class action asserting '33 Act claims against the issuers of mortgage-backed securities not traded on a national exchange. 195 Cal. App. 4th at 793. Reversing the Superior Court's dismissal for lack of subject matter jurisdiction, the California Court of Appeal, Second Appellate District, held that, contrary to statutory language, legislative intent, and federal authority, state courts after SLUSA retain concurrent jurisdiction over class actions alleging only '33 Act claims.[34] Commentators predicted that *Countrywide* would transform the California state court system into a haven for class-action plaintiffs alleging '33 Act claims.[35] The predictions

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[34] The court analyzed Section 16 and held that, because Sections 16(b), 16(c), and 16(d) dealt with state-law claims and not federal-law claims, "nothing, then, in [Section 16] describes this case[, which involved '33 Act claims], and thus, nothing in [Section 16] puts this case into the exception to the rule of concurrent jurisdiction." *Id.* at 797. The court concluded: "the fact that the case is not precluded and can be maintained, but cannot be removed to federal court if it is filed in state court, tells us that the state court has jurisdiction to hear the action." *Id.*

[35] "[I]f you are a plaintiff hoping to pursue a '33 Act claim in state court, your best bet [now] is to file the lawsuit in California stat[e] court." Kevin M. LaCroix, *So, There's Concurrent State Court Jurisdiction for '33 Act Suits, Right? Well . . .*, The D&O Diary (May 20, 2011).

came true: in California state courts after *Countrywide*, the number of class actions alleging '33 Act claims has increased by a factor of fourteen. *See supra* at 8 & note 5. The decision below, which relied on *Countrywide*, confirms the trend. 1a, 5a-6a.[36]

As a result, a key SLUSA provision has been largely nullified. Congress enacted SLUSA – the *Uniform* Standards Act – with the goal of providing uniform standards for securities class actions. The *elimination* of state-court jurisdiction over '33 Act class actions was meant to further that goal by having all such cases heard in federal court subject to federal standards. That makes sense: as Congress found abusive securities class actions to be harming the *national* economy, *Dabit*, 547 U.S. at 81, so SLUSA, by directing such litigation into federal court, ensured that securities class actions would be reformed *nationally*. But under *Countrywide* and similar cases, state courts – even as they are stripped of jurisdiction over state-law claims – still retain jurisdiction over federal-law claims. Class-action plaintiffs and lawyers are taking full advantage.

Allowing class actions alleging '33 Act claims to continue in state court splinters, rather than makes uniform, the application of national standards in class

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[36] *See* Douglas H. Flaum et al., *Why Section 11 Class Actions Are Proliferating In Calif.*, Law360 (Apr. 27, 2015) (noting that in choosing California state court, Section 11 plaintiffs "appear to be aware of and specifically taking advantage of the [*Countrywide*] decision[]").

actions. Many of the Reform Act's provisions are undisputedly inapplicable in state court. *See, e.g.*, 15 U.S.C. § 77z-1(a)(2), (a)(3)(A) (notice and certification requirements); *id.* § 77z-1(a)(3)(B)(iii) (lead plaintiff appointment process). Federal pleading standards also might not apply, and federal appellate review of trial court decisions would be unavailable. As a result, the outcome of class actions under the '33 Act "will frequently and predictably depend on whether it is brought in state or federal court," further destroying uniformity. *Felder v. Casey*, 487 U.S. 131, 151 (1988).

The practical consequences for litigants are even stranger. Under *Countrywide* and similar holdings, an issuer defendant can now face two securities class actions challenging the same IPO, one filed in federal court and the other filed in state court. That defendant can be forced to litigate simultaneously in different forums with separate procedural regimes – the antithesis of uniform national standards. Nor is this a mere hypothetical. Plaintiffs in federal-court class actions challenging IPOs have actually brought parallel state-court class actions under the '33 Act. In those state-court actions, plaintiffs have sought discovery despite the Reform Act's automatic discovery stay, which bars discovery pending a motion to dismiss. Compounding the confusion, state courts disagree on whether to stay the state case in deference to the federal case.[37]

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[37] *Compare Buelow v. Alibaba Group Holding Ltd.*, No. CIV535692, slip op. (Cal. Super. Ct. San Mateo Cty. Apr. 1, 2016) (refusing to stay state-court class action – which alleged '33 Act claims – in deference to federal-court class action alleging '34 Act

The consequent patchwork of legal regimes "undermine[s] the principal purpose of SLUSA," "makes no sense," and is "absurd," "bizarre," "inconceivable," "anomalous," "counter-intuitive," and "directly contrary to the stated intent of Congress."[38] As one court explained, "Congress's desire to create a unified national standard for securities class actions cannot be met if fifty different state jurisdictions now become the . . . interpreters of a federal statute. . . . Instead of a national standard, there will be fifty different standards." *Unschuld v. Tri-S Sec. Corp.*, 2007 U.S. Dist. LEXIS 68513, at *29-30 (N.D. Ga. Sept. 14, 2007) (footnote omitted) (remanding '33 Act class action while noting result at odds with congressional intent).[39] Courts "cannot interpret federal statutes to negate their own stated purposes." *King v. Burwell*, 135 S. Ct. 2480, 2493 (2015) (citation omitted).

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claims, where both actions arise out of IPO), *with In re Etsy, Inc. S'holder Litig.*, No. CIV 534768, slip op. (Cal. Super. Ct. San Mateo Cty. Feb. 29, 2016) (staying state-court action – which alleged '33 Act claims – in deference to federal-court action alleging '33 Act and '34 Act claims, where both actions arise out of IPO).

[38] *Rubin*, 2007 WL 778485, at *5; *Williams v. AFC Enters., Inc.*, 2003 U.S. Dist. LEXIS 28623, at *9-10 (N.D. Ga. Nov. 20, 2003); *Knox v. Agria Corp.*, 613 F. Supp. 2d 419, 423 (S.D.N.Y. 2009); *Northumberland Cty. Ret. Sys. v. GMX Res., Inc.*, 810 F. Supp. 2d 1282, 1287 (W.D. Okla. 2011); *Niitsoo*, 902 F. Supp. 2d at 798.

[39] The SLUSA Senate Report, which states that SLUSA was enacted to combat the "noticeable shift in class action litigation from federal to state courts," cites "[d]isparate, and shifting, state litigation procedures" and the concern with "fragmentation of our national system of securities litigation[.]" S. Rep. No. 105-182, 2d Sess., at 3 (1998).

2. The holding below was incorrect.

a. Respondents allege only '33 Act claims. Respondents also concede that this is a "covered class action." *Supra* at 9. SLUSA amended the '33 Act's jurisdictional provision, Section 22, by eliminating concurrent state jurisdiction over "covered class actions" that allege "offenses and violations under [the '33 Act]." 15 U.S.C. § 77v(a). Thus, the Superior Court should have held that it lacked subject matter jurisdiction.

SLUSA's amendment to Section 22 of the '33 Act provides that concurrent state-court jurisdiction over '33 Act claims will continue "except as provided in [Section 16] of this title with respect to covered class actions." *Id.* We refer to this amendment as the "Jurisdictional Amendment." Courts disagree as to whether the Jurisdictional Amendment should be read broadly as *except for covered class actions as defined in Section 16(f)* as opposed to restrictively as *except for the certain types of covered class actions precluded by Section 16(b) and removable by Section 16(c)*.[40] In Petitioners' view, the broad approach is correct, as exemplified by the decisions in *Knox v. Agria Corp.*, 613 F. Supp. 2d 419 (S.D.N.Y. 2009), and *Hung v. iDreamSky Tech. Ltd.*, 2016 U.S. Dist. LEXIS 8389 (S.D.N.Y. Jan. 25, 2016).

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[40] *See generally* Mitchell A. Lowenthal & Shiwon Choe, *State Courts Lack Jurisdiction to Hear Securities Act Class Actions, But The Frequent Failure To Ask The Right Question Too Often Produces The Wrong Answer*, 17 U. PENN. J. BUS. L. 739, 754, 759-78 (2015) (collecting cases).

In *Knox*, the court explained that SLUSA eliminated state-court jurisdiction over covered class actions alleging '33 Act claims. 613 F. Supp. 2d at 425 ("The exception in the jurisdictional provision of Section 22(a) exempts covered class actions raising ['33] Act claims from concurrent jurisdiction."). *Knox* involved a putative class action initially filed in state court solely under the '33 Act. Defendants removed that case to federal court pursuant to 28 U.S.C. § 1441(a) (federal question removal) rather than 15 U.S.C. § 77p(c) (SLUSA removal under Section 16(c) of the '33 Act). Plaintiffs moved to remand, citing the removal bar in the '33 Act: "Except as provided in [Section 16(c)], no case arising under [the '33 Act] and brought in any State court of *competent jurisdiction* shall be removed to any court of the United States." 613 F. Supp. 2d at 422 (quoting 15 U.S.C. § 77v(a) (emphasis added)). Because defendants did not remove under Section 16(c), the question in *Knox* was whether the state court was a court of "competent jurisdiction" and the case might have to be remanded,[41] or whether the state court lacked jurisdiction and federal question removal was proper.

To answer this question, the *Knox* court examined the meaning of the Jurisdictional Amendment by looking to Section 16 and each of its subsections. 613 F. Supp. 2d at 423-24. The court found that "[t]he

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[41] *Knox* expressly declined to address the scope of the exception to the removal bar as not necessary for its decision. 613 F. Supp. 2d at 423.

reference to Section 16 does not add a substantive limitation to the exception to concurrent jurisdiction in Section 22(a); rather it simply points the reader to the definition of a 'covered class action.'" *Id.* at 424. This interpretation "also harmonizes with the rest of SLUSA." *Id.* at 425. It is "consistent with SLUSA's addition to the anti-removal provision," which addition "prevents plaintiffs from frustrating removal of state-law based covered class actions by adding a non-removable individual ['33] Act claim to an otherwise removable state-law based covered class action." *Id.* It also "is consistent with Congress's general remedial intent in passing SLUSA: 'to prevent certain State private securities class action lawsuits alleging securities fraud from being used to frustrate the objectives of the [Reform Act].'" *Id.* (citation omitted). Finding that the state court lacked jurisdiction, the *Knox* court accordingly denied the motion to remand.

Hung addressed the same question as *Knox* and adopted *Knox*'s reasoning and holding. *See* 2016 U.S. Dist. LEXIS 8389, at *5-14. *Hung* included two other relevant holdings. First, it held that SLUSA's addition to the '33 Act's removal bar of the phrase "Except as provided in [Section 16(c)]" is "not relevant" where only federal-law securities claims are alleged. *Id.* at *6. Second, it rejected the plaintiff's reading of the Jurisdictional Amendment. According to the plaintiff's reading, the Amendment means "except with respect to those state-law class actions removable under [Section 16](c) and precluded by [Section 16](b)"; that is, the plaintiff argued, the Amendment stripped state

courts of jurisdiction over cases removable under Section 16(c). *Id.* at *8. But, as the court explained, the plaintiff's reading is precluded by *Kircher*, which held that a defendant can elect to leave a removable case in state court. *Id.* at *9. The plaintiff's reading also makes Section 22(a) internally inconsistent, by giving "state courts jurisdiction over *federal* claims 'except' for certain *state* claims" when "state claims, of course, are not a subset of federal claims, excisable through an exception." *Id.* at *9-10 (emphasis added). Finally, the plaintiff's reading produces the "odd result" of having state-law claims removed and dismissed but having federal-law claims stay in state court and proceed without application of the Reform Act's reforms. *Id.* at *12. According to the plaintiff's reading, "the [Reform Act] and SLUSA would encourage plaintiffs to litigate federal securities class actions in state court, with lessened procedural protections, and they would prohibit defendants from removing such cases to federal court." *Id.* at *12-13. "This outcome is implausible given the purpose of the Acts in question." *Id.* at *13.

The correct reasoning is that of *Knox*, *Hung*, and similar decisions, not that of the decision below.

b. *Countrywide* and similar federal decisions rest on two fatal errors.

First, such decisions violate principles of statutory interpretation. By holding that *no* covered class actions under the '33 Act are excluded from concurrent jurisdiction, those decisions render the Jurisdictional Amendment a nullity.

According to a favorite argument of class-action plaintiffs, those decisions hold that the Jurisdictional Amendment excluded only those state-law claims precluded by Section 16(b) and removable by Section 16(c). Under this reading, Section 22's Jurisdictional Amendment merely reiterates or "acknowledges" what is already stated in Section 16. That is far from the "real and substantial effect" Congress intends when it "acts to amend a statute." *Stone v. INS*, 514 U.S. 386, 397 (1995). Further, to acknowledge Section 16, the amendment need only have stated "except as provided in Section 16." The reference to "covered class action" under this reading is surplusage. As this Court has explained, however, "legislative enactments should not be construed to render their provisions mere surplusage." *Dunn v. CFTC*, 519 U.S. 465, 472 (1997).

Moreover, Section 22 grants concurrent jurisdiction for '33 Act claims, *not* state-law claims. *See Knox*, 613 F. Supp. 2d at 424; *Hung*, 2016 U.S. Dist. LEXIS 8389, at *9-10; 15 U.S.C. § 77v(a) ("jurisdiction of offenses and violations *under this subchapter*"; "suits in equity and actions at law brought to enforce any liability or duty *created by this subchapter*" (emphasis added)). It makes no sense that an amendment limiting the grant of such jurisdiction should refer to state-law claims.

Any purported reading of the Jurisdictional Amendment's reference to "covered class action" as being limited to cases with state-law claims violates the interpretive principle that "'when the legislature uses

certain language in one part of the statute and different language in another, . . . different meanings were intended.'" *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (citation omitted). Where Congress intended "covered class action" to refer to state-law claims, the statute adds modifying language: in Section 16(b) with "covered class action[s] *based upon* [*State law*]"; in Section 16(c) with "covered class action[s] . . . , *as set forth in subsection (b)*"; and in Section 16(d) with the preservation of certain "covered class action[s] . . . *based upon* [*State law*]." 15 U.S.C. § 77p (emphasis added). By contrast, the statute does *not* modify the references to "covered class action" in Sections 16(f) and 22(a).

Second, *Countrywide* and similar federal holdings urge a bizarre result that contradicts congressional intent: state courts lack jurisdiction to hear state-law securities class actions but retain jurisdiction over '33 Act class actions. Under principles of federalism, Congress generally tries not to "unduly interfere with the legitimate activities of the States." *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 431 (2010) (citation omitted). But where an action "arises under a law of the United States, Congress may, if it see[s] fit, give to the Federal courts exclusive jurisdiction." *Haywood v. Drown*, 556 U.S. 729, 756 (2009) (citation omitted). According to *Countrywide* and similar federal cases, Congress did just the opposite: it interfered with states' adjudication of their own laws, but chose not to act within its power to give federal courts exclusive jurisdiction over federal claims.

That courts have split on the import of the Jurisdictional Amendment may call into question what the

statutory language really means. But SLUSA's structure, as described in *Knox* and *Hung*, *see supra* at 31-33, reveals Congress's intent and makes clear the proper reading: that state courts no longer have jurisdiction over class actions under the '33 Act such as this one. *See King*, 135 S. Ct. at 2492 ("Given that the text is ambiguous, we must turn to the broader structure of the Act to determine the meaning of [the provision].").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, ET AL. Plaintiffs, vs. CYAN, INC., et al. Defendants.	Case No. CGC-14-538355 [Consolidated with 14-539008] ORDER DENYING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS (Filed Oct. 23, 2015)

I heard argument today on the captioned motion. I provided an oral tentative in open court, with a court reporter attending. For the reasons stated on the record I adopt the tentative and deny the motion.

Dated: October 23, 2015 /s/ *Curtis E.A. Karnow*
Curtis E.A. Karnow
Judge Of The
Superior Court

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, DANIAL LEMIRE, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On OCT 23 2015, I electronically served THE ATTACHED DOCUMENT via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: **OCT 23 2015**

T. Michael Yuen, Clerk

By: /s/ *Danial Lemire*
DANIAL LEMIRE, Deputy Clerk

APPENDIX B

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, et al., Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

CYAN, INC., et al.,

Defendants.

Case No. CGC-14-538355 (Consolidated with No. CGC-14-539008)

TRANSCRIPT OF PROCEEDINGS
San Francisco, California
Friday, October 23, 2015

REPORTED BY:
SHEILA PHAM, RPR
CSR No. 13293
Pages 1-14

Transcript of Proceedings, taken at SAN FRANCISCO SUPERIOR COURT, 400 McAllister Street, Department 304, San Francisco, CA 94102, beginning at 2:06 p.m. and ending at 2:18 p.m., on Friday, October 23, 2015, before Sheila Pham, RPR, Certified Shorthand Reporter No. 13293.

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Also Present:

Robin Wechkin

[4] San Francisco, California,
Friday, October 23, 2015 2:06 p.m. -- 2:18 p.m.

THE COURT: With respect to the motion, I think my hands are tied by Luther versus Countrywide, and so just have to deny the motion.

You're welcome to argue.

MR. FELDMAN: Thank you, Your Honor. I'd like to suggest a few reasons why your hands are not tied by that decision. Number 1, it is distinguishable. Countrywide is not traded on the national market.

THE COURT: I know, but there's nothing in the opinion that suggests that that matters.

MR. FELDMAN: It was not a basis for the Court's decision, and I think it's a basis for distinguishing it.

And second, the decision is a nullity because the Court lacks jurisdiction to decide it.

THE COURT: Which Court did?

MR. FELDMAN: Either the Superior Court or the Court of Appeals, they lack jurisdiction because Luther removed jurisdiction over those cases for state court.

THE COURT: I can ignore Luther because I think Luther -- because I don't think the Court of Appeal has the jurisdiction that it decided.

[5] MR. FELDMAN: Yes.

THE COURT: That's pretty tough. Okay.

MR. FELDMAN: If you decide you're going to follow Luther and if you think Luther was wrongly decided, I hope the Court will consider writing on the subject because we're going to take a writ and that way the Court of Appeals here will have an informed opinion as to why Luther may have got it wrong.

THE COURT: I appreciate that. I do that sometimes very, very rarely. Maybe once every few years. I feel quite strongly that my hands are tied in a way that they're not to be tied, and I hope and pray that the Court of Appeal across the street refers to me and they've been good enough to do that on the reversing, that is.

But I don't think that's this case. Luther doesn't seem to be inappropriate. Its reading of the statute is plausible. My guess is it's probably -- anybody cared, it's probably the right reading of the statute, but I don't think I really have anything to contribute as the trial judge on the issue.

MR. FELDMAN: Okay. Thank you.

THE COURT: But you've done what you need to do, and I appreciate what you're doing. And good luck.

MR. FELDMAN: Thank you.

[6] THE COURT: The attentive will be adopted and the motion will be denied.

Let's turn to case management. One thing I want to just talk about briefly, I have a proposed order regarding the pro hac vice application of Robin Wechkin, W-E-C-H-K-I-N. I don't know if that person is here.

MR. DOLAN: She is, Your Honor.

ROBIN WECHKIN: That's me.

THE COURT: Hi, how are you? I'm glad you're here.

I just want to briefly ask you something. You've sort of gone over my trip wire in terms of the amount of work that you're doing in California for the last two years. It doesn't mean there's anything wrong in the end with your application, but you've got cases in California for the last couple of years in Santa Clara and San Mateo. And I guess this would be your fourth California case, I think, in the last two years.

So my question is, as I try to determine a very ambiguous standard, which is whether or not you're sort of doing business here in California sufficiently that you should join the bar. Can you estimate for me about how much of your time, say, in the last two years has been spent on California cases? Rough percentage, and I'll accept whatever percentage you suggest.

[7] ROBIN WECHKIN: 20 percent.

THE COURT: About what?

ROBIN WECHKIN: I'd say about 20 percent.

THE COURT: About 20 percent. I'll sign the order.

ROBIN WECHKIN: Thank you, Your Honor.

THE COURT: Let's call the case management. There isn't much in the statement. I think it's -- we're getting to the time we need to talk about trial dates, looked at the other trial date and I think we need one. It's going to be a great focusing device for all of us.

And I don't know if people are in a position now to estimate it for me or I need to sit down another case management conference for this purpose. I want to know, first of all, is this a jury trial?

MR. GRANT: Yes, Your Honor.

THE COURT: Do people have estimates now of roughly how much time you think the trial will be?

MR. GRANT: The length of trial or to get to trial?

THE COURT: Both, both facts.

MR. GRANT: I don't know that we really talked about it.

THE COURT: Yeah. You need to talk about it [8] first, don't you? I think you do.

MR. SALCEDA: We believe that discovery in this case should be very narrow. In fact, there is a single issue. In fact, Mr. Grant and I and Mr. Dolan had

the pressure of being in Little Rock, Arkansas, yesterday for --

THE COURT: You were in Arkansas?

MR. SALCEDA: Yes, we were. We had a deposition in this matter yesterday.

We think that the case should be pretty quick to get through discovery, and what we urge is the Court consider -- and I don't know if the Court wants to do it now -- is to set a discovery cutoff but then a time for dispositive motions because I think we will have a very strong dispositive motion. We wouldn't want to have a situation where the Court doesn't have very much time to deal with it, and now we're doing all sorts of pretrial submissions.

THE COURT: Right.

MR. GRANT: Your Honor, one comment I do have is that the case involves a customer of defendants who is located in Arkansas, which requires us to go through out-of-state discovery processes.

THE COURT: Sure.

MR. GRANT: So if it was a customer down in Los [9] Angeles, it would be much, much easier to get that discovery taken care of.

THE COURT: You need out-of-state commissions or something?

MR. GRANT: Well, we've already issued one.

THE COURT: Okay.

MR. GRANT: But we were waiting to push them for production until we got the protective order signed. We started our meet and confer, but it's hard to tell -- at this point, I'm not sure if we need any motion to compel in Arkansas, which I do not have a lot of experience in Arkansas, Your Honor.

THE COURT: Well, I think the best way to do this is to have you meet and confer on this and the related subjects and I'll mention what the related subjects are, and for you to send me a proposal for us to get together again in a couple of weeks or month or so, not much work in that really, so we can set all these dates.

I think you should do the following: Propose a schedule for trial, what the dates would be. Estimate 4.2 hours per day for in-court time because I hear motions in other cases at 9:00 and at 4:00 every day. If there's going to be a jury, you want to add approximately three to four days to your trial estimate [10] for selection of jury and for jury deliberations because you should assume that another case will be finishing just as you come in, and then as soon as you're done, I have another case ready to go. I just swap the trials in like that. So although the number of days I allocate to this case might shrink, they will not grow. You will not get more days after we decide among ourselves about how many days it will be.

You should prepare a schedule that allows for dispositive motions, like summary judgment or summary

adjudication motions. And you will recall that these kinds of motions aren't just brought by defendants, they're brought by plaintiffs. When the summary judgment was first introduced to the United States, it was a device for plaintiffs to get rid of affirmative defenses a long time ago.

I want to set a schedule for motions in limine, including, specifically, important motions of motion in limine that might be questions for hearing like witnesses, for example, expert issues. So we want to get that teed up in advance. And we probably want to make sure we talk about your instructions before we pick the jury.

My hope is to settle the jury instructions substantially before we pick a jury. In part, because [11] if we wait until trial, we'll make ourselves nervous and also because it is often wise to give some of the substantive instructions to the jury before they hear the evidence so they have a good grip as to what sorts of things they should be looking for and not wait until the very end to tell them what the topic of the case is.

So with those constraints, I think you should meet and confer, come up with a schedule that you like. If you have disputes, obviously just put down your respective positions and what you think we should be doing, and then suggest when you're going to be ready to go and when because I need to reserve time on the Court's schedule.

When do you think you may be ready to come back and talk about this issue?

MR. GRANT: A couple of weeks.

THE COURT: Let's go off the record.

(Off the record.)

THE COURT: The next CMC is at 2:00 p.m. on the 10th of November and the parties' joint case management conference statement that will have the proposals with respect to trial dates and associated dates. And when you come in on the 10th, bring your own personal trial schedules because if I can't accommodate what you've picked out, I will be running over some other options at |12| the time. I really would like to set the trial date when we get together next time.

MR. GRANT: Your Honor, do you have a date when you want the CMC statement?

THE COURT: Well, the user's guide for the department suggests three days. Would that work for you?

MR. GRANT: Yes, Your Honor.

THE COURT: Is there anything else I can do for you today?

MR. GRANT: Your Honor, we have one question in connection with the class certification. We noticed that in the notice, there was a reference to filing the opt-outs, but there was no reference in that in any order that you issued. I was a little concerned that I may have just slipped up without even seeing it.

THE COURT: Probably did. What would you like me to do? You obviously need to file them. Do you need something from me?

MR. GRANT: I just want to be clear with Your Honor that it's okay to file that and that's what the Court expects.

THE COURT: Yes. I need to know about it.

MR. GRANT: Sure. And we'll redact personal –

THE COURT: Right. Absolutely. If there are [13] objections and people want to respond to them, I'll certainly see those responses as well. That's fine. Anything else I can do?

MR. GRANT: No, Your Honor.

THE COURT: I'll see you in November.

MR. GRANT: Thank you, Your Honor.

MR. FELDMAN: Thank you, Your Honor.

MR. SALCEDA: Thank you, Your Honor. (Transcript of Proceedings was concluded at 2:18 p.m.)

I, the undersigned, a Certified Shorthand Reporter of the State of California, do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth; that any witnesses in the foregoing proceedings, prior to testifying, were duly sworn; that a record of the proceedings was made by me using machine shorthand which was thereafter transcribed under my direction; that the

foregoing transcript is a true record of the testimony given.

Further, that if the foregoing pertains to the original transcript of a deposition in a Federal Case, before completion of the proceedings, review of the transcript [ ] was [ ] was not requested.

I further certify that I am neither financially interested in the action nor a relative or employee of any attorney or party to this action.

IN WITNESS WHEREOF, I have this date subscribed my name.

Dated November 4, 2015

/s/ *Sheila Pham*
Sheila Pham, RPR
CSR No. 13293

APPENDIX C

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

CYAN, INC. et al., Petitioner, v. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Respondent; BEAVER COUNTY EMPLOYEES RETIREMENT FUND, et al., Real Parties in Interest.	A146891 (City and County of San Francisco Super. Ct. Nos. CGC-14-538355 and CGC-14-539008) (Filed Dec. 10, 2015)

THE COURT:

The petition for writ of mandate, prohibition or other relief is denied.

(Ruvolo, P.J., Rivera, J. and Streeter, J. participated in the decision.)

DEC 10 2015

Ruvolo, P.J.
Presiding Justice

APPENDIX D

Court of Appeal, First Appellate District,
Division Four – No. A146891

S231299

IN THE SUPREME COURT OF CALIFORNIA

En Banc

CYAN, INC. et al., Petitioners,

v.

SUPERIOR COURT OF SAN FRANCISCO COUNTY,
Respondent;

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, et al., Real Parties in Interest.

(Filed Feb. 24, 2016)

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

APPENDIX E

Section 22(a) of the '33 Act – with language added by SLUSA in bold italics – provides:

> The district courts of the United States . . . shall have jurisdiction of offenses and violations under this subchapter [15 U.S.C. §§ 77a *et seq.*] . . . , and, concurrent with State and Territorial courts, ***except as provided in [Section 16] of this title with respect to covered class actions,*** of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. . . . ***Except as provided in [Section 16(c)] of this title,*** no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.

15 U.S.C. § 77v(a).

Section 16 of the '33 Act – with language added by SLUSA in bold italics – provides:

> Additional Remedies; ***Limitation on Remedies***
>
> ***(a) Remedies additional***
>
> ***Except as provided in subsection (b),*** the rights and remedies provided by this subchapter [15 U.S.C. §§ 77a *et seq.*] shall be in addition to any and all other rights and remedies that may exist at law or in equity.

(b) Class action limitations

No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –

(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or

(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

(c) Removal of covered class actions

Any covered class action brought in any State court involving a covered security, as set forth in subsection (b) of this section, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b) of this section.

(d) Preservation of certain actions

(1) Actions under State law of State of incorporation

(A) Actions preserved

Notwithstanding subsection (b) or (c) of this section, a covered class action described in subparagraph (B) of this paragraph that is based upon the statutory or common law of the State

in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

(B) Permissible actions

A covered class action is described in this subparagraph if it involves –

(i) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

(ii) any recommendation, position, or other communication with respect to the sale of securities of the issuer that –

(I) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

(II) concerns decisions of those equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

(2) State actions

(A) In general

Notwithstanding any other provision of this section, nothing in this section may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.

(B) "State pension" plan defined

For purposes of this paragraph, the term "State pension plan" means a pension plan established and maintained for its employees by the government of the State or political subdivision thereof, or by any agency or instrumentality thereof.

(3) Actions under contractual agreements between issuers and indenture trustees

Notwithstanding subsection (b) or (c) of this section, a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee may be maintained in a State or Federal court by a party to the agreement or a successor to such party.

(4) Remand of removed actions

In an action that has been removed from a State court pursuant to subsection (c) of this section, if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

(e) Preservation of State jurisdiction

The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

(f) Definitions

For purposes of this section, the following definitions shall apply:

(1) Affiliate of the issuer

The term "affiliate of the issuer" means a person that directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with, the issuer.

(2) Covered class action

(A) In general

The term "covered class action" means –

(i) any single lawsuit in which –

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which –

(I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

(B) Exception for derivative actions

Notwithstanding subparagraph (A), the term "covered class action" does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

(C) Counting of certain class members

For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

(D) Rule of construction

Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.

(3) Covered security

The term "covered security" means a security that satisfies the standards for a covered security specified in paragraph (1)

or (2) of section 77r(b) of this title at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under this subchapter pursuant to rules issued by the Commission under section 77d(2) of this title.

15 U.S.C. § 77p.

APPENDIX F

Electrical Workers Local #357 Pension and Health & Welfare Trusts v. Clovis Oncology, Inc., No. 16-cv-00933-EMC, 2016 WL 2592947 (N.D. Cal. May 5, 2016); *Fortunato v. Akebia Therapeutics, Inc.*, No. 15-13501-PBS, 2016 WL 1734073 (D. Mass. Apr. 29, 2016); *Badri v. TerraForm Global, Inc.*, No. 15-cv-06323-BLF, 2016 U.S. Dist. LEXIS 28127 (N.D. Cal. Mar. 3, 2016); *Iron Workers Mid-South Pension Fund v. TerraForm Global, Inc.*, No. 15-cv-6328-BLF, 2016 WL 827374 (N.D. Cal. Mar. 3, 2016); *Patel v. TerraForm Global, Inc.*, No. 16-cv-00073-BLF, 2016 WL 827375 (N.D. Cal. Mar. 3, 2016); *Carlson v. Ovascience, Inc.*, No. 15-14032-WGY, 2016 WL 2650707 (D. Mass. Feb. 23, 2016); *Buelow v. Alibaba Grp. Holding Ltd.*, No. 15-cv-05179-BLF, 2016 U.S. Dist. LEXIS 7444 (N.D. Cal. Jan. 20, 2016); *Kerley v. MobileIron Inc.*, No. 15-cv-04416-VC, slip op. (N.D. Cal. Nov. 30, 2015); *Cervantes v. Dickerson*, No. 15-cv-3825-PJH, 2015 U.S. Dist. LEXIS 143390 (N.D. Cal. Oct. 21, 2015); *City of Warren Police & Fire Ret. Sys. v. Revance Therapeutics, Inc.*, 125 F. Supp. 3d 917 (N.D. Cal. 2015); *Liu v. Xoom Corp.*, No. 15-CV-00602-LHK, 2015 U.S. Dist. LEXIS 82830 (N.D. Cal. June 25, 2015); *Pac. Inv. Mgmt. Co. LLC v. Am. Int'l Grp., Inc.*, No. SA CV 15-0687-DOC (DFMx), 2015 U.S. Dist. LEXIS 75355 (C.D. Cal. June 10, 2015); *Rosenberg v. Cliffs Natural Res., Inc.*, No. 1:14CV1531, 2015 U.S. Dist. LEXIS 48915 (N.D. Ohio Mar. 25, 2015); *Plymouth County Ret. Sys. v. Model N, Inc.*, No. 14-cv-04516-WHO, 2015 U.S. Dist. LEXIS 1104 (N.D. Cal. Jan. 5, 2015); *Rajasekaran v. CytRx Corp.*, No. CV 14-3406-GHK

(PJWx), 2014 U.S. Dist. LEXIS 124550 (C.D. Cal. Aug. 21, 2014); *Desmarais v. Johnson*, No. C 13-03666 WHA, 2013 U.S. Dist. LEXIS 153165 (N.D. Cal. Oct. 22, 2013); *Toth v. Envivo, Inc.*, No. C 12-5636 CW, 2013 U.S. Dist. LEXIS 147569 (N.D. Cal. Oct. 11, 2013); *City of Birmingham Ret. & Relief Sys. v. MetLife, Inc.*, No. 2:12-cv-02626-HGD, 2013 U.S. Dist. LEXIS 147675 (N.D. Ala. Aug. 23, 2013); *Reyes v. Zynga, Inc.*, No. C 12-05065 JSW, 2013 WL 5529754 (N.D. Cal. Jan. 23, 2013); *Niitsoo v. Alpha Natural Res., Inc.*, 902 F. Supp. 2d 797 (S.D. W. Va. 2012); *Harper v. Smart Techs., Inc.*, No. C 11-5232 SBA, 2012 WL 12505217 (N.D. Cal. Sept. 28, 2012); *Young v. Pac. Biosci. of Cal., Inc.*, No. 5:11-cv-05668 EJD, 2012 U.S. Dist. LEXIS 33695 (N.D. Cal. Mar. 13, 2012); *W. Va. Laborers Trust Fund v. STEC Inc.*, No. SACV 11-01171-JVS (MLGx), 2011 U.S. Dist. LEXIS 146846 (C.D. Cal. Oct. 7, 2011); *W. Palm Beach Police Pension Fund v. Cardionet, Inc.*, No. 10cv711-L(NLS), 2011 U.S. Dist. LEXIS 30607 (S.D. Cal. Mar. 24, 2011); *Parker v. Nat'l City Corp.*, No. 1:08 NC 70012, 2009 U.S. Dist. LEXIS 132947 (N.D. Ohio Feb. 12, 2009); *Hamel v. GT Solar Int'l Inc.*, No. 1:08-cv-00437-PB, slip op. (D.N.H. Feb. 12, 2009); *Layne v. Countrywide Fin. Corp.*, No. CV 08-3262 MRP, 2008 U.S. Dist. LEXIS 123896 (C.D. Cal. July 8, 2008); *Unschuld v. Tri-S Sec. Corp.*, No. 1:06-CV-2931-JEC, 2007 WL 2729011 (N.D. Ga. Sept. 14, 2007); *Bernd Bildstein IRRA v. Lazard Ltd.*, No. 05 CV 3388 (RJD) (RML), 2006 WL 2375472 (E.D.N.Y. Aug. 14, 2006); *Pipefitters Local 522 & 633 Pension Trust Fund v. Salem Commc'ns Corp.*, No. CV 05-2730-RGK (MCx), 2005 U.S. Dist. LEXIS 14202 (C.D. Cal. June 28, 2005);

Higginbotham v. Baxter Int'l, Inc., No. 04 C 4909, 2005 U.S. Dist. LEXIS 12006 (N.D. Ill. May 25, 2005); *Zia v. Medical Staffing Network, Inc.*, 336 F. Supp. 2d 1306 (S.D. Fla. 2004); *Steamfitters Local 449 Pension & Ret. Sec. Funds v. Quality Distrib., Inc.*, No. 8:04-cv-961-T-26MAP, 2004 U.S. Dist. LEXIS 32014 (M.D. Fla. June 25, 2004); *In re Tyco Int'l, Ltd., Multidistrict Litig.*, 322 F. Supp. 2d 116 (D.N.H. 2004); *Williams v. AFC Enters., Inc.*, No. 1:03-CV-2490-TWT, 2003 U.S. Dist. LEXIS 28623 (N.D. Ga. Nov. 20, 2003); *Haw. Structural Ironworkers Pension Trust Fund v. Calpine Corp.*, No. 03-cv-0714-BTM (JFS), 2003 U.S. Dist. LEXIS 15832 (S.D. Cal. Aug. 26, 2003); *Martin v. BellSouth Corp.*, No. 1:03-CV-728-WBH, 2003 U.S. Dist. LEXIS 28605 (N.D. Ga. July 2, 2003); *Nauheim v. Interpublic Group of Cos.*, No. 02-C-9211, 2003 WL 1888843 (N.D. Ill. Apr. 15, 2003); *In re Waste Mgmt. Inc. Sec. Litig.*, 194 F. Supp. 2d 590 (S.D. Tex. 2002).

APPENDIX G

Hung v. iDreamSky Tech. Ltd., Nos. 15-CV-2514 (JPO), 15-CV-2944 (JPO), 15-CV-3484 (JPO), 15-CV-3794 (JPO), 2016 U.S. Dist. LEXIS 8389 (S.D.N.Y. Jan. 25, 2016); *Wunsch v. Am. Realty Capital Props.*, No. JFM-14-4007, 2015 U.S. Dist. LEXIS 48759 (D. Md. Apr. 14, 2015); *Lapin v. Facebook, Inc.*, Nos. C-12-3195 MMC, C-12-3196 MMC, C-12-3199 MMC, C-12-3200 MMC, C-12-3201 MMC, C-12-3202 MMC, C-12-3203 MMC, 2012 U.S. Dist. LEXIS 119924 (N.D. Cal. Aug. 23, 2012); *In re Fannie Mae 2008 Sec. Litig.*, No. 08 Civ. 7831 (PAC), 2009 U.S. Dist. LEXIS 109888 (S.D.N.Y. Nov. 24, 2009); *Knox v. Agria Corp.*, 613 F. Supp. 2d 419 (S.D.N.Y. 2009); *Pinto v. Vonage Holdings Corp.*, No. 07-0062 (FLW), 2007 WL 1381746 (D.N.J. May 7, 2007); *Rubin v. Pixelplus Co.*, No. 06 Civ. 2964 (ERK), 2007 WL 778485 (E.D.N.Y. Mar. 13, 2007); *Rovner v. Vonage Holdings Corp.*, No. 07-178 (FLW), 2007 WL 446658 (D.N.J. Feb. 5, 2007); *In re King Pharms., Inc.*, 230 F.R.D. 503 (E.D. Tenn. 2004); *Kulinski v. Am. Elec. Power Co.*, No. 02-03-412, slip op. (S.D. Ohio Jan. 7, 2004) (overruling objection to magistrate judge's report in *Kulinski v. Am. Elec. Power Co.*, No. C-2-03-412, 2003 WL 24032299 (S.D. Ohio. Sept. 19, 2003)).

APPENDIX H

Brady v. Kosmos Energy, Ltd., Nos. 3:12-cv-0373-B, 3:12-cv-0781-B, 2012 U.S. Dist. LEXIS 176567 (N.D. Tex. July 10, 2012); *Northumberland County Ret. Sys. v. GMX Res., Inc.*, 810 F. Supp. 2d 1282 (W.D. Okla. 2011); *Purowitz v. DreamWorks Animation SKG, Inc.*, No. CV 05-6090 MRP (VBKx), 2005 U.S. Dist. LEXIS 46911 (C.D. Cal. Nov. 14, 2005); *Lowinger v. Johnston*, No. 3:05CV316-H, 2005 WL 2592229 (W.D.N.C. Oct. 13, 2005); *Alkow v. TXU Corp.*, Nos. 3:02-CV-2738-K, 3:02-CV-2739-K, 2003 WL 21056750 (N.D. Tex. May 8, 2003); *Brody v. Homestore, Inc.*, 240 F. Supp. 2d 1122 (C.D. Cal. 2003).

APPENDIX I

'33 ACT CLASS ACTIONS FILED IN CALIFORNIA STATE COURTS AFTER SLUSA

AFTER *COUNTRYWIDE*:

	Filing Date	Case Name	Case No.
1.	May 20, 2016	Wagner v. NantKwest, Inc.	Los Angeles County BC621292
2.	Apr. 28, 2016	Rivera v. Fitbit, Inc.	San Mateo County CIV538403
3.	Apr. 19, 2016	Braun v. NRG Yield, Inc.	Kern County BCV-16-100867
4.	Apr. 13, 2016	Pytel v. Sunrun Inc.	San Mateo County CIV538215
5.	Mar. 17, 2016	Beck v. Apigee Corporation	San Mateo County CIV537817
6.	Feb. 26, 2016	Geller v. LendingClub Corporation	San Mateo County CIV537300
7.	Feb. 17, 2016	City of Warren Police and Fire Retirement System v. Natera, Inc.	San Mateo County CIV537409
8.	Jan. 25, 2016	Giavara v. GoPro, Inc.	San Mateo County CIV537077
9.	Jan. 22, 2016	Electrical Workers Local #357 Pension And Health & Welfare Trusts v. Clovis Oncology, Inc.	San Mateo County CIV537068
10.	Jan. 14, 2016	Barnett v. Ooma, Inc.	San Mateo County CIV536959
11.	Dec. 7, 2015	Beaver County Employees Retirement Fund v. Avalanche Biotechnologies, Inc.	San Mateo County CIV536488
12.	Dec. 1, 2015	Rezko v. XBiotech Inc.	Los Angeles County BC602793
13.	Nov. 19, 2015	Kleiman v. Sientra, Inc.	San Mateo County CIV536313
14.	Oct. 23, 2015	Fraser v. Wuebbels (TerraForm Global, Inc.)	San Mateo County CIV535963
15.	Oct. 5, 2015	Buelow v. Alibaba Group Holding Limited	San Mateo County CIV535692
16.	Aug. 24, 2015	Steinberg v. MobileIron, Inc.	Santa Clara County 1-15-CV-284761
17.	Aug. 11, 2015	Shen v. TrueCar, Inc.	Los Angeles County BC590999
18.	July 21, 2015	Cervantes v. Dickerson (Etsy, Inc.)	San Mateo County CIV534768
19.	June 2, 2015	Hunter v. Aerohive Networks, Inc.	San Mateo County CIV534070
20.	May 1, 2015	City of Warren Police and Fire Retirement System v. Revance Therapeutics, Inc.	San Mateo County CIV533635, transferred on Nov. 6, 2015 to Santa Clara County 15-CV-287794

21.	Apr. 2, 2015	Firerock Global Opportunity Fund LP v. Castlight Health, Inc.	San Mateo County CIV533203
22.	Mar. 20, 2015	O'Donnell v. Coupons.com, Inc.	Santa Clara County 1-15-CV-278399
23.	Jan. 29, 2015	City of Warren Police and Fire Retirement System v. A10 Networks, Inc.	Santa Clara County 1-15-CV-276207
24.	Jan. 6, 2015	Liu v. Xoom Corp.	San Francisco County CGC-15-543531
25.	Oct. 16, 2014	Berliner v. Pacific Coast Oil Trust	Los Angeles County BC560944
26.	Sept. 5, 2014	Plymouth County Retirement System v. Model N, Inc.	San Mateo County CIV530291
27.	June 20, 2014	In re FireEye, Inc. Securities Litigation	Santa Clara County 1-14-CV-266866
28.	Apr. 3, 2014	Rajasekaran v. CytRx Corp.	Los Angeles County BC541426
29.	Apr. 1, 2014	Beaver County Employees Retirement Fund v. Cyan, Inc.	San Francisco County CGC-14-538355
30.	July 10, 2013	Desmarais v. Johnson (CafePress Inc.)	San Mateo County CIV522744
31.	Oct. 19, 2012	Toth v. Envivio, Inc.	San Mateo County CIV517481
32.	Sept. 13, 2012	Robinson v. Audience, Inc.	Santa Clara County 1-12-CV-232227
33.	Aug. 1, 2012	Reyes v. Zynga Inc.	San Francisco County CGC-12-522876
34.	May 30, 2012	Lapin v. Facebook, Inc.	San Mateo County CIV514240
35.	Mar. 13, 2012	Marcano v. Nye (Zeltiq Aesthetics, Inc.)	Alameda County RG12621290
36.	Oct. 21, 2011	Young v. Pacific Biosciences of California, Inc.	San Mateo County CIV509210
37.	Sept. 27, 2011	Harper v. Smart Technologies, Inc.	San Francisco County CGC-11-514673
38.	July 1, 2011	West Virginia Laborers' Trust Fund v. STEC, Inc.	Orange County 30-2011-00489022

BEFORE *COUNTRYWIDE*:

	Filing Date	**Case Name**	**Case No.**
1.	Apr. 15, 2008	Layne v. Countrywide Financial Corp.	Los Angeles County BC389208
2.	Nov. 14, 2007	Luther v. Countrywide Home Loans Servicing LP	Los Angeles County BC380698
3.	July 29, 2005	Purowitz v. DreamWorks Animation SKG, Inc.	Los Angeles County BC337475
4.	Mar. 9, 2005	Pipefitters Local 552 and 633 Pension Trust Fund v. Salem Communications Corp.	Ventura County CIV232456
5.	Mar. 11, 2003	Hawaii Structural Ironworkers Pension Trust Fund v. Calpine Corp.	San Diego County GIC806973
6.	Sept. 23, 2002	Brody v. Homestore, Inc.	Los Angeles County BC281956

APPENDIX J

Appellate Courts
Case Information

CALIFORNIA COURTS
THE JUDICIAL BRANCH
OF CALIFORNIA

1st Appellate District

Court data last updated: 05/22/2016 02:10 PM

Docket (Register of Actions)

Cyan Inc. et al. v. Superior Court of the City and County of San Francisco
Division 4
Case Number A146891

Date	Description	Notes
12/02/2015	Filed petition for writ of:	Mandate and/or Prohibition
12/02/2015	Filing fee.	
12/02/2015	Exhibits lodged.	1 Volume
12/02/2015	Filed proof of service.	
12/10/2015	Order denying petition filed.	The petition for writ of mandate, prohibition or other relief is denied. (Ruvolo, P.J., Rivera, J. and Streeter, J. participated in the decision.)
12/10/2015	Case complete.	

12/21/2015	Service copy of petition for review received.	Filed in California Supreme Court by Wilson Sonsini, attorneys for petitioners Cyan Inc. et al
12/24/2015	Record transmitted to Supreme Court.	
01/11/2016	Received copy of:	Answer to petition for review; filed in California Supreme court by Robbins Geller, attorneys for RPIs Beaver County Retirement Fund et al
01/19/2016	Received:	"reply to answer to petition for review";
01/25/2016	Received copy of:	Letter to California Supreme Court from Robbins Geller, attorneys for RPI Beaver County Employees; dated 1/21/16, re new court decision
01/28/2016	Received copy of:	Letter to California Supreme Court, dated 1/27/16, from Wilson Sonsini, attorneys for petitioner Cyan; re new case authority

02/01/2016	Ext. by Supreme Court re: petition for hearing filed:	The time for granting or denying review in the above-entitled matter is hereby extended to and including March 17, 2016, or the date upon which review is either granted or denied.
02/24/2016	Petition for review denied in Supreme Court.	

APPENDIX K

Appellate Courts Case Information

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

Supreme Court

Court data last updated: 05/22/2016 02:10 PM

Docket (Register of Actions)

CYAN v. S.C. (BEAVER COUNTY EMPLOYEES RETIREMENT FUND)
Case Number S231299

Date	Description	Notes
12/18/2015	Petition for review filed	Petitioner: Cyan, Inc. Attorney: Boris Feldman Petitioner: Mark A. Floyd Attorney: Boris Feldman Petitioner: Michael W. Zellner Attorney: Boris Feldman Petitioner: Michael L. Hatfield Attorney: Boris Feldman Petitioner: Paul A. Ferris Attorney: Boris Feldman Petitioner: Promod Hague Attorney: Boris Feldman Petitioner: M. Niel Ransom Attorney: Boris Feldman

		Petitioner: Michael J. Boustridge Attorney: Boris Feldman
		Petitioner: Robert E. Switz Attorney: Boris Feldman
12/18/2015	Record requested	
12/18/2015	Note:	Court of Appeal record has been imported and is available in electronic format.
01/07/2016	Answer to petition for review filed	Real Party in Interest: Beaver County Employees Retirement Fund
		Real Party in Interest: Retirement Board of Allegheny County
		Real Party in Interest: Delaware County Employees Retirement System
		Real Party in Interest: Jennifer Fleischer Attorney: Andrew S. Love
01/15/2016	Reply to answer to petition filed	Petitioner: Cyan, Inc. Attorney: Boris Feldman
		Petitioner: Mark A. Floyd Attorney: Boris Feldman
		Petitioner: Michael W. Zellner Attorney: Boris Feldman

		Petitioner: Michael L. Hatfield Attorney: Boris Feldman Petitioner: Paul A. Ferris Attorney: Boris Feldman Petitioner: M. Niel Ransom Attorney: Boris Feldman Petitioner: Michael J. Boustridge Attorney: Boris Feldman Petitioner: Robert E. Switz Attorney: Boris Feldman
01/21/2016	Filed:	Letter, dated January 21, 2016, from Andrew S. Love, counsel for RPI, regarding a recent decision.
01/27/2016	Filed:	Letter, dated January 27, 2016, from Boris Feldman, counsel for petitioners, regarding new authority.
01/29/2016	Time extended to grant or deny review	The time for granting or denying review in the above-entitled matter is hereby extended to and including March 17, 2016, or the date upon which review is either granted or denied.

02/24/2016	Petition for review denied	
03/07/2016	Returned record	petition for review

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AND
BRIEFS

Supreme Court, U.S.
FILED
AUG 24 2016
OFFICE OF THE CLERK

No. 15-1439

IN THE

Supreme Court of the United States

CYAN, INC., *et al.*,

Petitioners,

v.

BEAVER COUNTY EMPLOYEES' RETIREMENT FUND, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Superior Court of the State of California for the County of San Francisco

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners seek review of an unpublished order of a California state trial court that concededly conflicts with no state or federal appellate ruling on a question that only one appellate court in the nation has ever decided. The question is whether after the Securities Litigation Uniform Standards Act of 1998 state courts continue to possess concurrent jurisdiction over claims brought under the Securities Act of 1933, just as they always have since that statute's enactment.

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STATEMENT OF THE CASE

For more than eighty years, since the enactment of the Securities Act of 1933 ("1933 Act"), state courts have had concurrent jurisdiction to decide federal law claims brought under that statute. In the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Congress precluded certain *state law* securities class actions outright. In a "Conforming Amendment," H.R. Rep. No. 105-640 at 4, 16 (1998); H.R. Rep. No. 105-803 at 5 (1998), Congress amended the 1933 Act to reflect that limitation on state court claims.

Consistent with state courts' longstanding jurisdiction, respondents brought this lawsuit against petitioners in a California superior court asserting claims under the 1933 Act. Petitioners moved to dismiss, asserting that the Conforming Amendment did not merely preclude state law class actions outright, but also did something very different: eliminated concurrent jurisdiction for 1933 Act claims. The superior court rejected that argument, applying *Luther v. Countrywide Fin. Corp.*, 195 Cal. App. 4th 789 (2011), a state appellate ruling that this Court previously declined to review. Both the state court of appeals and the state supreme court declined to review the superior court's interlocutory ruling.

1. From the earliest days of the federal securities laws, state courts have possessed concurrent jurisdiction over securities claims brought under both state law and the 1933 Act. Jurisdiction over state claims was, of course, provided by state law. With respect to federal claims under the 1933 Act, that statute expressly provided for jurisdiction of federal courts, "concurrent with State . . . courts"

> of all suits . . . brought to enforce any liability or duty created by this title. . . . [And that n]o case arising under this title and brought in any State court of competent jurisdiction shall be removed to any court of the United States.

Securities Act of 1933, Pub. L. No. 73-22, Title I, § 22, 48 Stat. 86, *codified as subsequently amended at* 15 U.S.C. § 77v(a). By contrast, federal district courts possess exclusive jurisdiction to decide claims under the Securities Exchange Act of 1934 ("1934 Act"). 15 U.S.C. § 78aa(a).

Subsequently, in the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Congress imposed a variety of procedural restrictions on the litigation of securities fraud class actions under the federal securities laws. PSLRA, Pub. L. No. 104-67, 109 Stat. 737 (1995); *see Kircher v. Putnam Funds Trust*, 547 U.S. 633, 636 (2006). In response, some shareholders began filing essentially the same securities fraud class action claims, pleaded instead under state securities laws in state and federal court. *Id.*

Congress enacted SLUSA as a targeted response to the use of state law claims to evade the PSLRA. SLUSA added substantive provisions to the 1933 Act and the 1934 Act precluding certain state law securities class actions altogether. *See Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058, 1068 (2014); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 81-82 (2006). In § 77p, SLUSA precludes "covered class actions" alleging deception with respect

to "covered securities,"[1] from being maintained in state or federal court, but *only* with respect to claims "based upon the statutory or common law of any State." 15 U.S.C. § 77p(b). If plaintiffs nonetheless bring a prohibited state law suit in state court, it may be removed to federal district court, where it must be dismissed. 15 U.S.C. § 77p(c).

SLUSA thus eliminates the ability to adjudicate state law securities class action claims in state and federal court. SLUSA therefore included a "Conforming Amendment" to the 1933 Act. That amendment modified the 1933 Act's provision (quoted above) to provide for jurisdiction of federal courts, concurrent with state courts, "except as provided in section [77p of this title] with respect to covered class actions." SLUSA, Pub. L. No. 105-353, Title I, § 101(a)(3), 112 Stat. 3230 (1998), *codified at* 15 U.S.C. § 77v(a). Further, removal of claims under the 1933 Act is prohibited "[e]xcept as provided in section [77p](c) of this title." *Id.* Section 77p is the provision that precludes certain state law "covered class actions"; § 77p(c) is the specific subsection that permits the removal of the state law suits prohibited by SLUSA in order to be dismissed automatically thereafter by the federal district court.

2. In 2014, respondents brought this covered class action against petitioners in California superior court. Respondents' complaint asserts claims under the 1933 Act. It does not assert any state law claim subject to SLUSA.

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[1] A "covered class action" involves fifty or more plaintiffs. 15 U.S.C. § 77p(f)(2)(A)(i). A "covered security" is principally a security traded on a national exchange. 15 U.S.C. § 77r(b)(1).

Petitioners themselves previously recognized that "Congress has left in place federal and state concurrent jurisdiction of claims under the Securities Act of 1933." Petition for Review, *Cyan v. Superior Court of California*, California Supreme Court No. S222702, at 4 (Nov. 21, 2014). Petitioners nonetheless moved to dismiss this suit for lack of jurisdiction. They argued that the Conforming Amendment eliminated state court jurisdiction over covered class actions asserting claims under the 1933 Act, requiring dismissal. According to petitioners, when Congress specified that federal and state courts possess concurrent jurisdiction "except as provided in Section 77p of this title with respect to covered class actions," it eliminated state court jurisdiction over *all* "covered class actions," including class actions asserting federal claims under the 1933 Act.

The superior court rejected petitioners' argument on the basis of the California Court of Appeal's ruling in *Countrywide*, 195 Cal. App. 4th 789, which both the California Supreme Court and this Court previously declined to review. *Countrywide Fin. Corp. v. Luther*, 565 U.S. 1080 (2011); California Supreme Court No. S194319 (Sep. 14, 2011). The appellate court in *Countrywide* recognized that SLUSA's Conforming Amendment preserves the ability of state courts to adjudicate 1933 Act claims *"[e]xcept as provided in Section 77p."* 195 Cal. App. 4th at 795 (emphasis in original). In turn, § 77p "provides" only two limitations with respect to maintaining securities claims in state courts. Consistent with Congress's targeted response to the use of state law securities fraud claims to evade the PSLRA, § 77p: (i) precludes *state law* securities fraud class action claims, and (ii) provides that those same *state law* claims may be removed to a federal district court, which must dismiss them. By

contrast, § 77p does not "provide" anything with respect to maintaining class actions in state court generally, including class actions under the 1933 Act. Thus, the Conforming Amendment

> does not say that there is an exception to concurrent jurisdiction for *all* covered class actions. Nor does it create its exception by referring to the definition of covered class action in . . . section 77p(f)(2). Instead, it refers to section 77p without limitation, and creates an exception to concurrent jurisdiction only as provided in section 77p "with respect to covered class actions."

Countrywide, 195 Cal. App. 4th at 795 (emphasis added).

The superior court's ruling rejecting petitioners' jurisdictional objection was interlocutory. Petitioners sought review in the California Court of Appeal, which declined to review the case. California Court of Appeal, First Appellate Dist., No. A146891 (Dec. 10, 2015). Petitioners then sought review in the California Supreme Court, which has never decided the Question Presented, and which denied review as well. California Supreme Court No. S231299 (Feb. 24, 2016).

REASONS FOR DENYING THE WRIT

This case does not come close to satisfying any of the criteria for this Court's review. This Court lacks jurisdiction to review the unpublished, interlocutory ruling of the state superior court. That ruling, moreover, has only ever been the subject of a single appellate ruling and does not conflict with any appellate authority in any state or federal court. There is no merit to petitioners' arguments that obstacles exist to such a conflict emerging, and so this Court should

reject petitioners' request to depart from its ordinary criteria for review. The ruling below is, moreover, correct.

1. This Court lacks jurisdiction because the Superior Court's decision denying petitioners' motion for judgment on the pleadings is not "final" within the meaning of 28 U.S.C. § 1257.

Petitioners acknowledge, as they must, that "merits litigation is ongoing in the Superior Court," and so the decision below plainly is interlocutory. Petition for Writ of Certiorari ("Pet.") 17. Indeed, an order denying a dispositive motion is the opposite of final because it "ensures that litigation will continue." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 275 (1988). Petitioners argue, however, that the Superior Court's interlocutory decision should be treated as final because the jurisdiction question is discrete and anterior to the merits, and it would serve various policy objectives to consider it sooner rather than later. These arguments are unpersuasive.

The limitations on this Court's power embodied in § 1257 are long-settled, and rooted in powerful principles of "efficiency, judicial restraint, and federalism." *Pennsylvania v. Ritchie*, 480 U.S. 39, 72 (1987) (Stevens, J., dissenting). Although this Court has, on occasion, granted certiorari to consider a state court's resolution of a federal question before the conclusion of state proceedings, petitioners have not cited a case in which the underlying substantive claim itself arose under federal rather than state law. Indeed, this Court has recognized that "[i]n most, if not all, of the cases" in which it has exercised jurisdiction, the additional state "proceedings would *not* require the decision of other federal questions that might also require review by the Court at a later date." *Cox Broad. Corp.*

v. Cohn, 420 U.S. 469, 477 (1975) (emphasis added). Thus, in describing *Construction & Gen. Laborers' Union v. Curry*, 371 U.S. 542 (1963), and *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555 (1963), both cited by petitioners, the Court noted that in each case, "the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court" and preventing the Court from considering the federal question after final judgment. *Cox*, 420 U.S. at 482-83. Here, however, there are no potential alternate state grounds that would frustrate this Court's exercise of jurisdiction after a true final judgment. If petitioners lose on the merits, they can bring their jurisdictional claim to this Court's attention in due course. Moreover, delaying review until after final judgment would prevent "piecemeal review with respect to federal issues." *Flynt v. Ohio*, 451 U.S. 619, 621 (1981).

In light of that fact, petitioners' policy arguments are unpersuasive. If petitioners are correct about the merits, then the policies embodied in the PSLRA can be vindicated upon review after a final judgment in this case. Indeed, petitioners' position is no different from any other class action defendant that fails to win by dispositive motion. On the other hand, petitioners do not address the countervailing policy concerns, *i.e.*, that immediate review in this Court will deal a blow to the federalism, comity, and efficiency principles that underlie § 1257.

Petitioners cite *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985), which held that the denial of qualified immunity was reviewable on appeal under 28 U.S.C. § 1291. But qualified immunity presents an unusual exception to the long-established rule that "denial

of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable." *Catlin v. United States*, 324 U.S. 229, 236 (1945). And immunity is, of course, different from petitioners' effort to dismiss respondents' action because petitioners are not arguing that they are entirely immune from suit; they are only disputing the appropriate forum. This Court has never regarded such decisions as final. *See, e.g., Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 501 (1989) (holding that denial of motion based on contractual forum clause was not final because the clause did not entitle the petitioner "to avoid suit altogether, and an entitlement to avoid suit is different in kind from an entitlement to be sued only in a particular forum"); *Van Cauwenberghe v. Biard*, 486 U.S. 517, 524 (1988) (holding that the question is whether "the claimed right is a right not to stand trial"). Here, petitioners themselves argue that the "right" they are asserting is the right to litigate in a federal forum – *i.e.*, exactly the sort of right that this Court has found insufficient to trigger finality in the § 1291 context. Pet. 19.

To put it another way: if a federal district court had refused to dismiss a case under the 1993 Act for lack of subject matter jurisdiction, that decision would not be appealable to a circuit court of appeals, let alone this Court. It is odd indeed for petitioners to argue that a substantively identical decision, rendered in a state trial court, should receive greater scrutiny from this federal appellate Court.

2. Even if this Court possessed jurisdiction, certiorari should be denied. The interlocutory posture of the case counsels strongly in favor of deferring review until the entry of a final judgment. The state court of appeal and state supreme court have not yet spoken

to the superior court's jurisdiction over this case, and either could do so later in the proceedings, *e.g.*, after final judgment. Also, because respondents' substantive claims arise under federal law, and could therefore present one or more issues meriting review in this Court, the more efficient course is to permit all of the federal law issues in the case to be presented together in a single petition after the entry of final judgment.

Further, only one appellate court in the country has *ever* decided the Question Presented. This Court routinely permits such issues to percolate in the appellate courts to determine whether a conflict arises and to give time for a better understanding of the legal question to emerge.

Because the issue has only ever been decided by a single appellate court, by definition the unpublished, nonprecedential ruling below does not conflict with any state or federal appellate authority. Petitioners do not contend otherwise. Review is inappropriate for that reason alone.

Petitioners argue that this Court should depart from its ordinary criteria for granting certiorari because it is unlikely that a conflict could ever emerge. In fact, state appellate courts can easily decide the Question Presented, and could create a conflict worthy of review. As discussed, the issue was decided by a California court of appeal in *Countrywide*. Although petitioners are correct that the ruling in *Countrywide* currently binds California superior courts, they omit the far more important point: that is only because no state court of appeal in any of the other five appellate districts in California has yet decided the issue. There is no obstacle to defendants securing such a ruling in their favor. *See Sarti v. Salt Creek Ltd.*, 167 Cal. App. 4th 1187, 1193 (2008). This case is proof positive:

petitioners sought interlocutory review in a different California court of appeal. There, they described such review as "[r]outine[]." Petition for Writ of Mandate and/or Prohibition or Other Relief, *Cyan, Inc. et al. v. Beaver County Employees Retirement Fund, et al.*, California Court of Appeal, First Appellate District, No. A146891, at 8 (Dec. 2, 2015).

The state supreme court can decide the question (whether or not the court of appeal grants review), but has not yet done so – although it could in another case or after the entry of final judgment in this case. Petitioners themselves sought review in the California Supreme Court. It is no surprise that the state supreme court would decline to step in to review an interlocutory jurisdictional objection in the absence of any conflict in its lower courts. But that hardly provides a basis for *this* Court to do so given that the question has been decided by only one appellate court anywhere in the nation.

And that is just California. There are forty-nine other states, the District of Columbia, and courts of U.S. territories. Claims under the 1933 Act can be, and are, brought in those local courts. The relevant appellate courts can review those rulings, frequently an interlocutory matter and always after the entry of final judgment. Petitioners' argument that cases under the 1933 Act are regularly brought in state court means only that this Court will have no shortage of opportunities to decide the Question Presented.

Review is also available in the federal courts of appeals, in exactly the same fashion as every other context in which a claim is removed from state to federal court, which must then consider whether to remand the dispute to state court. Contrary to the necessary assumption of petitioners' argument, this

Court has not applied different certiorari criteria in such cases. The very fact that Congress generally precluded the courts of appeal from reviewing orders granting remand is strong evidence that this Court's immediate intervention in such cases is not warranted.

Although appellate review may be unavailable in cases in which the district court grants remand, that is not uniformly true. *Luther v. Countrywide Home Loans Sevicing LP*, 533 F.3d 1031, 1033 (9th Cir. 2008); *Illinois Mun. Ret. Fund v. Citigroup, Inc.*, 391 F.3d 844, 848-49 (7th Cir. 2004). Further, petitioners' suggestion that remand is frequently granted is ultimately just an acknowledgment that their interpretation of the Conforming Amendment lacks merit. Remand is granted only because district courts overwhelmingly *agree* with the ruling below. In such circumstances, where there is little to no disagreement in the lower courts, this Court's intervention is unwarranted.

If federal district courts instead reverse course and begin to adopt petitioners' argument on the merits, they will deny remand and the plaintiffs can seek permission to appeal under 28 U.S.C. § 1292 or appeal from the eventual final judgment. The subsequent appellate rulings would, of course, be subject to review in this Court.

Petitioners argue that it is frequently costly to await the outcome of the proceedings in the trial court. To the extent that is so, it is not remotely unique to this Question Presented. The same could be said with respect to every securities class action – indeed, every class action. Yet, this Court has not applied different certiorari criteria in those contexts.

3. There is accordingly no merit to petitioners' argument that the Question Presented has led to "chaos" in the lower courts. There is no conflict in any binding precedent at any level of any state or federal court anywhere in the United States. There simply is no precedent for this Court to grant review in such a circumstance, where the Question Presented has only ever been decided by a single appellate court in the nation – and by no state supreme court or federal court of appeals.

Petitioners identify a supposed conflict in district court rulings, highlighting decisions issued from 2015 onward. Pet. 12 n.10. In fact, there is now a "dominant view around the country" (*Badri v. TerraForm Global, Inc.*, No. 15-cv-06323-BLF, 2016 WL 827372 (N.D. Cal. Mar. 3, 2016) (quotation marks and citation omitted), that "has almost uniformly been upheld by the district courts since 2012." *City of Warren Police & Fire Ret. Sys. v. Revance Therapeutics, Inc.*, 125 F. Supp. 3d 917, 921 (N.D. Cal. 2015).

In the post-2014 period highlighted by petitioners, nineteen federal district courts have decided the Question Presented. Of those, only two accepted petitioners' argument, one in a two-paragraph summary order[2]; the other seventeen are consistent with the ruling below.[3] Petitioners' self-selected period also omits

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[2] *Hung v. iDreamSky Tech. Ltd.*, No. 15-CV-2514 (JPO), 2016 U.S. Dist. LEXIS 8389 (S.D.N.Y. Jan. 25, 2016); *Wunsch v. Am. Realty Capital Props.*, No. JFM-14-4007, 2015 U.S. Dist. LEXIS 48759 (D. Md. Apr. 14, 2015).

[3] *Westmoreland Cnty. Emp. Ret. Fund v. Inventure Foods, Inc., et al.*, No. 2:16-cv-01410-PHX-JMM, slip op. (D. Az. Aug. 11, 2016); *Rivera v. Fitbit, Inc.*, No. 16-CV-02890-SI, 2016 WL 4013504 (N.D. Cal. July 27, 2016); *Pytel v. Sunrun Inc.*, No. C 16-2566-CRB, 2016 U.S. Dist. LEXIS 90417 (N.D. Cal. July 12,

the time between August 2012 and January 2015, in which five district courts decided the Question Presented, all consistent with the decision below.[4] So, in the past four years, defendants are batting two for twenty-four – less than 9% of cases.[5] That is a pattern

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2016); *Elec. Workers Local #357 Pension and Health & Welfare Trs. v. Clovis Oncology, Inc.*, No. 16-cv-00933-EMC, 2016 WL 2592947 (N.D. Cal. May 5, 2016); *Fortunato v. Akebia Therapeutics, Inc.*, No. 15-13501-PBS, 2016 WL 1734073 (D. Mass. Apr. 29, 2016); *Badri*, 2016 WL 827372; *Iron Workers Mid-South Pension Fund v. TerraForm Global, Inc.*, No. 15-cv-6328-BLF, 2016 WL 827374 (N.D. Cal. Mar. 3, 2016); *Patel v. TerraForm Global, Inc.*, No. 16-cv-00073-BLF, 2016 WL 827375 (N.D. Cal. Mar. 3, 2016); *Carlson v. Ovascience, Inc.*, No. 15-14032-WGY, 2016 WL 2650707 (D. Mass. Feb. 23, 2016); *Buelow v. Alibaba Grp. Holding Ltd.*, No. 15-cv-05179-BLF, 2016 U.S. Dist. LEXIS 7444 (N.D. Cal. Jan. 20, 2016); *Kerley v. MobileIron Inc., et al.*, No. 15-cv-04416-VC, slip op. (N.D. Cal. Nov. 30, 2015); *Cervantes v. Dickerson*, No. 15-cv-3825-PJH, 2015 U.S. Dist. LEXIS 143390 (N.D. Cal. Oct. 21, 2015); *City of Warren.*, 125 F. Supp. 3d 917; *Liu v. Xoom Corp.*, No. 15-CV-00602-LHK, 2015 U.S. Dist. LEXIS 82830 (N.D. Cal. June 25, 2015); *Pac. Inv. Mgmt. Co. LLC v. Am. Int'l Grp., Inc.*, No. SA CV 15-0687-DOC (DFMx), 2015 U.S. Dist. LEXIS 75355 (C.D. Cal. June 10, 2015); *Rosenberg v. Cliffs Nat. Res., Inc.*, No. 1:14CV1531, 2015 U.S. Dist. LEXIS 48915 (N.D. Ohio Mar. 25, 2015); *Plymouth Cty. Ret. Sys. v. Model N, Inc.*, No. 14-CV-04516-WHO, 2015 65110 (N.D. Cal. Jan. 5, 2015).

[4] *Rajasekaran v. CytRx Corp.*, No. CV 14-3406-GHK (PJWx), 2014 U.S. Dist. LEXIS 124550 (C.D. Cal. Aug. 21, 2014); *Desmarais v. Johnson*, No. C 13-03666 WHA, 2013 U.S. Dist. LEXIS 153165 (N.D. Cal. Oct. 22, 2013); *Toth v. Envivo, Inc.*, No. C 12-5636 CW, 2013 U.S. Dist. LEXIS 147569 (N.D. Cal. Oct. 11, 2013); *City of Birmingham Ret. & Relief Sys. v. MetLife, Inc.*, No. 2:12-cv-02626-HGD, 2013 U.S. Dist. LEXIS 147675 (N.D. Ala. Aug. 23, 2013); *Reyes v. Zynga, Inc.*, No. C 12-05065 JSW, 2013 WL 5529754 (N.D. Cal. Jan. 23, 2013).

[5] Moreover, an average of six cases annually across the country is hardly the litigation tsunami portrayed by petitioners.

of uniformity in the district courts, not a striking conflict that requires this Court's early intervention.

Petitioners point to some older district court decisions. But disagreements among the district courts are commonplace and it is well-settled that they do not merit review in this Court. Further, those rulings bind no other court and the more recent pattern favoring the ruling below is clear. Unless that emerging consensus reverses itself in the courts of appeals, this Court should apply its ordinary criteria and deny certiorari.

Petitioners purport to identify a 1400 percent "spike[]" in California state court filings of 1933 Act cases since the California Court of Appeal's ruling in *Countrywide*. Only lawyers could come up with such statistics. Pet. 8. That is, in fact, a total of thirty-eight cases in five years, or an average of just over seven cases annually, Pet. 8 & n.5, which certainly is not so significant as to justify departing from this Court's ordinary certiorari criteria.

That is particularly true given that any increase in litigation plainly is not attributable to *Countrywide*. Petitioners argue to the contrary based only on the bald assertion of one of their fellow securities defense counsel. Pet. 27 n.36. But that self-interested argument makes no sense. *Countrywide* did not change the law: state courts have had jurisdiction over claims under the 1933 Act since the statute's adoption. Nothing about *Countrywide* would cause an increase in litigation; there were not even other appellate rulings around the country that would have inhibited such suits. Petitioners specifically note that fourteen of the thirty-eight California state cases were filed in 2015, but provide no explanation for why the 2011

decision in *Countrywide* would lead to an increase in new state court filings in California four years later.

Further, if petitioners were right that *Countrywide* and other cases rejecting their position increased state court litigation, they would be able to cite systemic increases in other states. They cannot.

In fact, the increase in claims under the 1933 Act is principally attributable to an increase in initial public offerings. It is those filings that have spiked in California, increasing from four in 2009 to twenty in 2010, and then rising in a steady progression to highs of forty-four in 2013 and fifty-four in 2014 – the years immediately preceding the greatest jump in 1933 Act cases.[6] For example, petitioner Cyan's IPO was one of

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[6] *See* Wilmer Hale, 2016 IPO Report, https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/2016-WilmerHale-IPO-Report.pdf. Importantly, it was not merely the volume of IPOs that led to an increase in 1933 Act cases in state and federal court, but the rise in grossly overvalued IPOs that were quick to miss earnings expectations after filing. *See, e.g.*, Laura Lorenzetti, IPOs raised $249 billion in 2014, and the fundraising frenzy could continue, *FORTUNE*, Jan. 5, 2015; Matt Krantz, IPOs rigged? 68% of new stocks fall short, *USA TODAY*, August 14, 2014. The Jumpstart Our Business Startups Act ("JOBS Act"), enacted in 2012, eased the requirements for going public for newer, growing companies. As reported by CFO.com, 76% of issuers that went public in the blockbuster year of 2014 filed under the JOBS Act. Many of these IPOs were of poor quality. As an October 2015 PriceWaterhouseCoopers study found, because "[s]maller companies are often limited in their accounting and financial reporting capabilities, given their stage of growth, small staff, and amount of resources they are able to invest in the business," those "limitations may result in a less-defined and more poorly developed internal control environment, which often leads to [material weaknesses]." PriceWaterhouseCoopers, Material weaknesses: Why disclosing them before your IPO may make sense, October 2015, www.pwc.com/us/en/deals/publications/assets/pwc-deals-ipo-material-weakness-disclosure.pdf. *See also*

forty-four filed in California in 2013. This increase in IPO filings – 1250% using petitioners' math – is why more such suits have been filed in *both* state *and* federal court in California, a critical fact that petitioners' statistics omit.[7] If petitioners were right, there would be fewer federal court suits, not more.

3. Finally, this Court's early intervention is unwarranted because the ruling below is plainly correct. The Conforming Amendment modifies the 1933 Act to provide that state courts continue to adjudicate claims brought under the 1933 Act "except as provided in section [77p of this title] with respect to covered class actions." SLUSA, Pub. L. No. 105-353, Title I, § 101(a)(3), 112 Stat. 3230 (1998), *codified at* 15 U.S.C. § 77v(a). Petitioners stress that the definition of "covered class actions" is not limited to state law claims. That is true, but not persuasive. The definition on which petitioners rely has no operative effect in isolation. Section 77p thus does not "*provide[]*" anything with respect to maintaining "covered class actions" generally, including actions raising only claims under the 1933 Act. Rather, § 77p "*provide[s]*" that "covered class actions"

Judy Greenwald, JOBS Act triggers rise in public stock offerings and IPO-related litigation, *BUSINESS INSURANCE*, October 12, 2014; John C. Coffee Jr., Gone With the Wind: Small IPOs, the JOBS Act, and Reality, *THE CLS BLUE SKY BLOG*, Feb. 1, 2013.

[7] To verify the increase in federal filings, respondents' counsel conducted a detailed search of public dockets found on the Stanford Law School's Securities Class Action Clearinghouse (http://securities.stanford.edu/filings.html), supplemented by Lexis Nexis Courtlink. Counsel searched for all post-SLUSA cases filed in federal district courts nationwide alleging 1933 Act claims, and reviewed the complaints in each case to verify the claims raised. This search disclosed nine cases filed in 2011, four cases in 2012, eight cases in 2013, four cases in 2014 and eleven cases in 2015.

asserting *state law* claims (§ 77p(b)) may not be maintained in state or federal court, and that such *state law* actions may be removed to federal district court to be dismissed (§ 77p(c)). The Conforming Amendment, in turn, addresses only those cases.

Petitioners read out of the statute the express reference to how § 77p "provide[s]" for limitations on maintaining covered class actions based on state law. If Congress intended SLUSA to operate as petitioners contend, it could have (and would have) written the statute differently. Similar to the 1934 Act, it would have provided that federal courts have "exclusive jurisdiction" for covered class actions under the 1933 Act. *See* n.10, *infra*.

Petitioners' argument also cannot be reconciled with Congress's purpose in enacting SLUSA. Congress's expressly stated goal in enacting that statute was to prevent the evasion of the PSLRA through the filing of *state law* securities claims. SLUSA, Pub. L. No. 105-353, 112 Stat. 3227 (1998) (SLUSA's purpose is "to limit the conduct of securities class actions under State law.") Congress further sought to promote uniformity by preventing "the dangers of maintaining differing federal and state standards of liability for nationally-traded securities." S. Rep. No. 105-182, at 3 (1998). Allowing 1933 Act claims to proceed in state court was completely consistent with the PSLRA, which permitted such suits, just as had always been true since the 1933 Act's adoption.

That is why petitioners err in arguing that state court suits under the 1933 Act are not subject to the PSLRA: that is true only because that is how Congress designed the PSLRA, generally choosing to respect state courts' authority over their own procedures. Nothing in SLUSA reversed that choice, which is

rooted in sound principles of federalism.[8] There is nothing unusual about recognizing "concurrent state court jurisdiction even where federal law provided for special procedural mechanisms" in federal court. *Tafflin v. Levitt*, 493 U.S. 455, 466 (1990) (concurrent jurisdiction despite extended venue and service-of-process provisions for RICO cases that are only applicable in federal court).[9]

Contrary to petitioners' assertions (Pet. 28), adjudication of 1933 Act class action cases in state court does not undermine uniform interpretation of the 1933 Act. "SLUSA promotes uniformity to some degree by ensuring that covered class actions alleging securities fraud can only proceed under federal law, which is ultimately reviewable by [this] Court." *Fortunato*, 2016 WL 1734073, at *5. Concurrent jurisdiction "creates no significant danger of inconsistent application of federal [] law" where, as here, federal courts would "retain full authority and responsibility for the interpretation and application of federal [] law," not "bound by state court interpretations," and state

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[8] Petitioners contend that the practical consequences of allowing concurrent jurisdiction for 1933 Act class action cases is having simultaneous cases in state and federal court – which they assert is "strange[]." Pet. 28. But parallel litigation is not an unusual feature of claims for which there is concurrent jurisdiction, and courts have various procedural mechanisms for adjudicating such cases. For example, as petitioners themselves note, state courts can stay the state court action in deference to a federal court action. *Id.* 28 n.27.

[9] *See also Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962) (concurrent jurisdiction over Labor Management Relations Act § 301 suits despite federal enforcement and venue provisions); *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980) (concurrent jurisdiction over 42 U.S.C. § 1983 suits, despite federal procedural proviaions of § 1988).

courts would not only be "guided by federal court interpretations of the relevant federal [] statutes" but "[s]tate court judgments misinterpreting federal [] law would, of course, also be subject to direct review by this Court." *Tafflin*, 493 U.S. at 464-65. Indeed, "this Court's ability to review state court decisions of federal questions would sufficiently protect federal interests." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1574 (2016).

Moreover, the mechanism Congress chose in enacting SLUSA was to extinguish a category of suits outright: it forbade class actions based on state law that were assertedly being used to evade the PSLRA. Those suits could not be pursued in either state *or* federal court. But petitioners read the Conforming Amendment to do something very different: to *maintain* suits under the 1933 Act, so long as they are filed in federal district court. Pet. 27. That reading of the statute – shifting only the *forum* of litigation, not the *form* of the claim – is inconsistent with SLUSA's basic design.

Any doubt is resolved by two settled principles of statutory construction. First, there is a "'deeply rooted presumption in favor of concurrent state court jurisdiction,'" that is rebuttable only if "'Congress affirmatively ousts the state courts of jurisdiction over a particular federal claim.'" *Mims v. Arrow Fin. Servs., LLC.*, 132 S. Ct. 740, 748 (2012) (citation omitted). This Court's practice is to "read[] jurisdictional laws, so long as consistent with their language, to respect the traditional role of state courts in our federal system." *Manning*, 136 S. Ct. at 1567-68. The presumption of concurrent state court jurisdiction can therefore only be overcome "'by an explicit statutory

directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Tafflin*, 493 U.S. at 460 (quoting *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981)). The 1934 Act, for example, provides an express bar to concurrent jurisdiction over securities claims as opposed to the language of the Conforming Amendment to the 1933 Act.[10]

Second, when Congress designates a statutory provision a "conforming amendment" it is evidence of "legislative intent that the amendment should be read as a nonsubstantive reaction to related legislation." *Springdale Mem'l Hosp. Ass'n, Inc. v. Bowen*, 818 F.2d 1377, 1386 n.9 (8th Cir. 1987) (citing *CBS, Inc. v. FCC*, 453 U.S. 367, 381-82 (1981)); *see also Dir. of Revenue of Missouri v. CoBank ACB*, 531 U.S. 316, 324 (2001) (rejecting interpretation of statute that "would mean that Congress made a radical – but entirely implicit – change in the [legislation] . . . with [an amendment that] was merely one of numerous 'technical and conforming amendments' to the Farm Credit Act") (citation omitted). If Congress intended to provide for exclusive jurisdiction over class actions brought under the 1933 Act, it "would have said as much." *Rajasekaran*, 2014 U.S. Dist. LEXIS 124550, at *12-*15. It certainly would not have made such a significant change to state courts' long-standing concurrent jurisdiction over

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[10] 15 U.S.C. § 78aa (1934 Act) ("The district courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter . . . , and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder."); *see also Tafflin*, 493 U.S. at 471, (Scalia, J., concurring).

claims under the 1933 Act through a conforming amendment.

The "isolated snippets" of legislative history cited by petitioners, *Clovis*, 2016 WL 2592947, at *9 n.7, do not amount to an "unmistakable implication from legislative history" of a congressional intent to eliminate state courts' jurisdiction over claims under the 1933 Act. *Mims*, 132 S. Ct. at 748. SLUSA's first sentence states that its purpose is "[t]o amend the Securities Act of 1933 . . . to limit the conduct of securities class actions under State law." SLUSA, Pub. L. No. 105-353, 112 Stat. 3227 (1998).

Indeed, "[n]othing in SLUSA's text or the legislative history suggests that Congress intended to place roadblocks in the way of federal claims . . .; its only discernible intent was to preclude the use of the class-action device to prosecute certain state-law class action claims." *Proctor v. Vishay Intertechnology Inc.*, 584 F.3d 1208, 1228 (9th Cir. 2009). The overwhelming weight of SLUSA's legislative history thus demonstrates that "Congress . . . sought to curb the state law end-around [the PSLRA] by 'prevent[ing] state laws from being used to frustrate the operation and goals of the [PSLRA].'" *Clovis*, 2016 WL 2592947, at *9 (quoting S. Rep. No. 105-182 at 2); *see Unschuld v. Tri-S Security Corp.*, No. 1:06-CV-02931-JEC, 2007 WL 2729011, at *8 (N.D. Ga. Sept. 14, 2007) ("Congress was simply trying to preempt or preclude state law, *not state fora*, from being used in securities class actions.")

Finally, petitioners' argument cannot be reconciled with *Kircher*, 547 U.S. 633. *Kircher* held that under SLUSA an order remanding a securities class action to state court is not appealable. *Id.* at 640. In relevant part, the Court explained that the "authorization for

the removal in subsection (c)" is "confined to cases 'set forth in subsection (b)'" – *i.e.*, to those state law class actions precluded by SLUSA. *Id.* at 642 (citation omitted). In turn, except with respect to those precluded state law class actions, "the federal court . . . has no jurisdiction to touch the case on the merits, and the proper course is to remand to the state court that can deal with it." *Id.* at 643-44. Respondents' suit against petitioners under the 1933 Act contains no state law claim precluded by SLUSA. Directly contrary to petitioners' submission, *Kircher* concludes that a federal district court "has no jurisdiction" over the suit, which instead belongs in the California superior court "that can deal with it." *Id.*

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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RECORD AND BRIEFS

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CYAN, INC., et al.,

Petitioners,

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, First Appellate District

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

A. To End the Chaos in the Lower Courts, This Court Should Settle the Question Presented

The need for this Court's review is now even more urgent. Just since May 2016, when the instant petition was filed, six new district court decisions have issued on the question presented.[1] Only days ago, the District of Delaware – where most U.S. companies are incorporated – deepened the lower-court conflict by ruling that state courts lack subject matter jurisdiction over '33 Act class actions.[2] Also since May, four new '33 Act class actions have been filed in California state court.[3] And thus far in 2016, more new decisions have issued, and more new class actions have been filed in California state court, than in all of 2015.[4] The split in the lower courts is growing, and the pace of forum-shopping is accelerating.

1. "Orwellian" is the only way to describe Respondents' assertion that the lower courts are not in chaos. Opp. 12-14.[5] Respondents ignore all of the conflicts described in the Petition. Pet. 11-13. Respondents argue that there is no *appellate* conflict (Opp. 12), but that argument makes *Petitioners'* point: the structural impediments to appellate review in both the federal

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[1] *See* Reply Appendix A.

[2] *See* Reply Appendix A. The other five decisions were to the contrary. *See id.*

[3] *See* Reply Appendix B.

[4] Pet. Appendices F, G, I; Reply Appendices A, B.

[5] *See* Opp. 11 ("little to no disagreement in the lower courts").

and state courts (Pet. 13-16) militate for, not against, a grant of certiorari. That conclusion is especially apt here, where dozens of district courts are issuing diametrically opposed holdings in the continuing absence of authoritative appellate guidance. Nor is appellate conflict a prerequisite for certiorari (Opp. 6, 14): Supreme Court Rule 10(c)'s first clause – invoked here (Pet. 10) – conspicuously requires *no* appellate conflict.

Also unavailing is Respondents' argument that a "'dominant view around the country'" has emerged.[6] The so-called "dominant view" may be prevalent in courts within the Ninth Circuit, but is almost uniformly rejected in courts within the Second and Third Circuits.[7] *Hung* (Pet. 30, 32-33) and the decision in Delaware this week dispose of any suggestion that recent case law uniformly supports Respondents (Opp. 12-14). The relatively large number of decisions by California courts results simply from the fact that, in recent years, more California-based companies have had IPOs than have companies based elsewhere. Opp. 15-16 & n.6 (citing Wilmer Hale, 2016 IPO Report).

Inexplicably, Respondents argue that "[n]othing about *Countrywide* would cause an increase in litigation" in California state court. Opp. 14. *Countrywide* unequivocally reopened the Reform Act's loophole that SLUSA had closed. Pet. 6-7, 25-26. Respondents argue that state courts have had jurisdiction over Section 11 claims since 1933 (Opp. 14), but, prior to the Reform

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[6] Opp. 12, 14.

[7] *See* Reply Appendix A; Pet. Appendices F, G.

Act, state-court litigation of any securities class action was a rarity. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81-82 (2006). Although Respondents assert that "there were not even other appellate rulings around the country that would have inhibited such suits" (Opp. 14), the assertion ignores the suit-inhibiting effect of SLUSA itself (Pet. 5-8, 24-29).[8]

Respondents' argument that there are no impediments to federal appellate review cannot withstand scrutiny. Contrary to Respondents' suggestion (Opp. 11), a decision that grants remand in a '33 Act class action where (as here) a covered security is at issue is uniformly unappealable (Pet. 15 & n.19). The Ninth Circuit's decision in *Countrywide* is distinguishable for reasons (*see* Pet. 15 n.19, 20 n.28) ignored by Respondents. *Illinois Mutual Retirement Fund v. Citigroup, Inc.*, 391 F.3d 844, 848-49 (7th Cir. 2004), falls into the category of "irrelevant exceptions" to the bar to review of a remand order, 28 U.S.C. § 1447(d). *See* Pet. 13 & n.16. Respondents also ignore Petitioners' argument that review under 28 U.S.C. § 1292(b) is barred for decisions granting remand and is disfavored for decisions denying remand. Pet. 14-15. Respondents' suggestion that a decision denying remand can be reviewed after final judgment fails for the reasons discussed *infra* at A.2.

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[8] Respondents' attempt to blame the spike in California state-court filings on California's IPO boomlet fails. Respondents do not identify the number of California federal-court filings for the period before *Countrywide*, only for the period *after*. Opp. 15-16 & n.7.

Respondents' argument that there are no impediments to state appellate review is meritless. Contrary to Respondents' assertion (Opp. 9), forbidding obstacles deter defendants from getting another California appellate district to rule contrary to the *Countrywide* court (and thus to create an appellate conflict that might induce the California Supreme Court to grant review). In *every* superior court in California, *every* defendant in a '33 Act class action is required to litigate all the way to final judgment – and then appeal – before getting the *first* real opportunity to obtain a jurisdictional dismissal. Pet. 16 & n.21. Respondents so concede. Opp. 9. That requirement drastically reduces the chances of any California appellate court addressing the question presented, let alone deciding it contrary to *Countrywide*. *See* A.2., *infra*.[9] Nor is the present case "proof positive" that a defendant can readily obtain a decision in conflict with *Countrywide* from another California appellate court (Opp. 9-10): the Court of Appeal, First District (and, for that matter, the California Supreme Court) *denied* interlocutory review. If Petitioners must litigate to final judgment before they can obtain state appellate review of the question presented, it is unlikely that there will *ever*

[9] Even if a state's highest court decided that state courts have subject matter jurisdiction, a defendant sued thereafter in that state's trial court would still be entitled to remove, and the federal court would still be entitled to deny any remand motion. Thus, review by state appellate courts will neither resolve the federal-court split on the jurisdictional issue nor diminish the federal court's power to disagree with the state's highest court on that issue.

be such review, given the overwhelming likelihood – recognized by Congress and this Court – of settlement in securities class actions, *see* A.2., *infra*.[10]

Respondents' remaining policy arguments fail. The policy of avoiding piecemeal review of federal issues (Opp. 9) bows to the policy of granting certiorari where, as here, the federal issue not only is convulsing lower courts but also would evade review if the petitioners first had to litigate through discovery to final judgment and then appeal up through the state courts, *see A.2., infra*.[11] The assertion that certiorari should not be granted absent a decision by the California Supreme Court (Opp. 8-9) ignores this Court's Rule 10(c), which authorizes this Court to review a decision of a "state court" – unlike Rule 10(b), which authorizes review of a decision of a "state court *of last resort.*" (Emphasis added.) The assertion also ignores this Court's decisions authorizing certiorari where, as here, the state's highest court declines review. Pet. 18-19.

2. Respondents' finality argument (Opp. 6-7, 11) is insidious. According to Respondents, certiorari should be unavailable until after Petitioners litigate

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[10] Contrary to Respondents' argument (Opp. 10), no other state's appellate court has decided the question presented. Nor do Respondents remotely suggest that other states host enough companies going through IPOs to create any significant body of '33 Act actions and appeals.

[11] *See Cox Broadcasting Corp. v. Cohn* ("*Cox*"), 420 U.S. 469, 478 n.7 (1975); *see also U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 398 (1980) (relaxing jurisdictional requirements where issue was "capable of repetition, yet evading review").

through discovery to final judgment and then appeal through the state courts. But that position would make the decision below – and similar jurisdictional holdings -- effectively unreviewable.

One of the evils that the Reform Act and SLUSA sought to eliminate from securities class actions was the "extortionate settlement[]." *Dabit*, 547 U.S. at 81; *see also Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975); Pet. 5, 14 & n.18. Congress recognized that the threat of disproportionate and crushing liability was effectively a gun to the defendant's head, forcing settlement even in nuisance or meritless cases. *Dabit*, 547 U.S. at 81. Contrary to Respondents' suggestion (Opp. 7-8), the extortionate settlement endemic to securities class actions distinguishes this case from the ordinary case where a defendant loses a threshold dispositive motion and must await final judgment to appeal. Here, Congress not only identified such gun-to-the-head settlements as harming the national economy but also passed the Reform Act and SLUSA to eliminate them *and the concomitant deprivation of the defendant's day in court*. In the absence of the Reform Act's and SLUSA's protections (*e.g.*, in California state court), defendants in securities class actions would not await final judgment to appeal. Rather, they would be foreclosed – by extortionate settlements – from appeal altogether.

This Court's recent decisions in securities class actions are the proof. Of those decisions, *not one involved a final judgment entered after discovery*. All involved a

motion to dismiss, a motion to remand, or a motion for class certification.[12]

There is a special irony here. Not only has Congress's effort to eliminate the extortionate settlement – and to restore the defendant's day in court – been undone by California state courts in *Countrywide* and progeny. But the decisional law applied by those same courts now insulates *Countrywide* from appellate correction. *See supra* at 4; Pet. 16 & n.21. If Petitioners' jurisdictional challenge must await discovery, final judgment, and appeal for its first meaningful hearing, the extortionate settlement problem will almost certainly prevent the challenge from getting to that hearing, and hence to this Court. If *Countrywide* is not to be insulated from review, certiorari must be granted *now*.

Finally, Respondents misread *Cox*, 420 U.S. at 477, 482-83, as authorizing certiorari *only* where the party seeking review might prevail below on a "nonfederal" ground (and thus cause the federal issue to evade Supreme Court review). Opp. 7. *Cox* held that, under certain conditions (*e.g.*, where, as here, reversal of the decision below would preclude further litigation, and refusal to grant certiorari would seriously erode federal policy, *see* Pet. 17-18, 21), the possible disposition of the case in a manner that would cause the federal issue to evade Supreme Court review is a sufficient basis on which to grant certiorari. 420 U.S. at 482-83.

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[12] The 14 decisions issued since 2000 are listed in Reply Appendix C.

Although *Cox* cited, as such a possible disposition, a merits victory on a nonfederal issue by the party seeking review, *id.* at 482, *Cox*'s reasoning shows that other such review-evading dispositions would suffice to justify certiorari. Here, a settlement extorted by a plaintiff unbound by the Reform Act and SLUSA – a case outcome whose likelihood was recognized explicitly by Congress, *see Dabit*, 547 U.S. at 81, and by this Court in *Blue Chip Stamps*, 421 U.S. at 740 – and the consequent preclusion of further review is such a disposition.[13]

B. The Jurisdictional Question, Undisputedly Important, Was Wrongly Decided Below

On the merits, Respondents' main contention – that SLUSA's exception to Section 22(a)'s grant of concurrent state jurisdiction does not reference federal-law class actions (Opp. 16-17) – proves nothing. The exception also does not mention state-law class actions. That fact, even by Respondents' logic, demonstrates a congressional intent to exclude *federal-law*

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[13] As to 28 U.S.C. § 1257(a)'s third prong (*see* Pet. 17 n.23, 19-20), Respondents' authorities are inapplicable, because they interpret only 28 U.S.C. § 1291, not 28 U.S.C. § 1257(a). Opp. 8 (citing cases). Because of "[s]pecial considerations of federalism," decisions interpreting each statute are not interchangeable. 16B Charles A. Wright et al., FEDERAL PRACTICE AND PROCEDURE § 4008, at 204 (3d ed. 2012). The terms "right" and "immunity" (*see* Pet. 19-20), which Respondents' authorities interpret, do not appear in § 1291. The capacious phrasing of § 1257(a) – "any title, right, privilege, or immunity" – indicates a far broader conception of finality than does the reading of the non-statutory terms "right" and "immunity" appearing in Respondents' cases.

class actions from concurrent state jurisdiction. As the Petition argued (Pet. 34-35), where Congress intended "covered class actions" to refer to state-law class actions, it added modifying language – see, for example, the phrase "covered class action[s] based upon [State law]" in Section 16(b). The unmodified use of "covered class actions" in Section 22(a) demonstrates that Congress intended to exclude at least federal-law class actions from concurrent state jurisdiction. *See* Pet. 34-35.

In any event, Respondents must concede that SLUSA's exception to Section 22(a)'s grant of concurrent state jurisdiction speaks broadly of "covered class actions," without expressly singling out *either* state-law *or* federal-law actions. This statutory breadth itself demonstrates a congressional intent to except *all* covered class actions from concurrent state jurisdiction.

Respondents are wrong when they assert that if Congress had wanted to create *exclusive jurisdiction*, it would have said so *in haec verba*. Opp. 17. There is no magic formula for a withdrawal of concurrent jurisdiction. Moreover, the bare term "exclusive jurisdiction" was not necessarily consistent with the delicate balance that the SLUSA Congress was trying to achieve: having covered class actions heard only in federal court *while preserving concurrent state jurisdiction over individual actions*. Pet. 7-8.

Respondents also misread the statutory evidence concerning Congress's purpose in enacting SLUSA.

Opp. 17. Petitioners have never disputed that *one* of Congress's goals was to limit state-law securities class actions. Pet. 7, 25. But Petitioners maintain – and Respondents fail to acknowledge – that *another* of Congress's goals was to bar federal-law securities class actions from being litigated in state *court*. Pet. 7, 25. As a preliminary matter, Respondents' quotation from SLUSA (Opp. 17, 21) is selective, omitting the italicized language in the phrase "An Act To amend the Securities Act of 1933 and the Securities Exchange Act of 1934 to limit the conduct of securities class actions under State law, *and for other purposes*." SLUSA, Pub. L. No. 105-353, 112 Stat. 3227 (1998) (emphasis added). In quoting from SLUSA, Respondents also omit Congress's "[f]inding[]" that "a number of securities class action lawsuits have shifted from Federal to State *courts*." *Id.* (emphasis added). This language does not limit the lawsuits at issue to those under state *law*. Respondents further fail to mention Congress's "[f]inding[]" that SLUSA's goal is "to prevent certain *State* private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the [Reform Act]," which finding is not limited to lawsuits under state *law*. *Id.* (emphasis added).

Nor will the disuniformity, and consequent litigation abuses, spawned by the decision below (Pet. 5, 24-29) be sufficiently addressed by Supreme Court review following discovery, final judgment, and appeal through the state system. Opp. 18-19. Even apart from extortionate settlements foreclosing appeal, *see supra* at 6, Supreme Court review will never be more than a

mere possibility, because certiorari jurisdiction is discretionary. And the harm here is not the standard delay that intervenes between a complaint and a Supreme Court decision. Rather, the harm is the set of litigation abuses that will plague the *process* leading to a Supreme Court decision – abuses that, unlike ordinary litigation delay, Congress has expressly banned.

SLUSA's legislative history demonstrates that the intent underlying SLUSA's exception to concurrent state jurisdiction was to solve a problem not limited to state-*law* class actions: the problem was also state-*court* class actions, regardless of whether the claim was under state or federal law. The SLUSA Conference Report states that SLUSA made federal court the "*exclusive* venue for most securities class action lawsuits." Pet. 26 (quoting Conference Report) (emphasis added). The SLUSA Senate Report states that SLUSA was enacted to combat the "noticeable shift in class action litigation from federal to state *courts*." Pet. 29 n.39 (quoting Senate Report) (emphasis added). The same report clarifies that "[u]nder [SLUSA], certain class actions could not be based on state law *and could only be maintained in federal courts*." Senate Report at 9-10 (emphasis added). The report also highlights "the Committee's intent that [SLUSA] be interpreted broadly to reach . . . *all* other procedural devices that might be used to circumvent the class action definition." *Id.* at 8 (emphasis added).

Respondents misplace reliance on *Tafflin v. Levitt*, 493 U.S. 455, 466 (1990) (Opp. 18). *Tafflin* held that any *one* of three bases – explicit statutory text, unmistakable legislative history, or clear incompatibility between state jurisdiction and federal interests – is sufficient to establish the withdrawal of concurrent jurisdiction. *Id.* at 459-60. *Tafflin*'s discussion cited by Respondents (Opp. 18) concerned only the last ground. Here (contrary to Respondents' assertion, *see* Opp. 19-20), the first two grounds are each established. *See supra* at 8-10, 11; Pet. 7, 25, 30-36.[14]

Respondents' discussion of "conforming amendments" (Opp. 20-21) signifies nothing. The language of SLUSA's exception to concurrent jurisdiction in Section 22(a) cannot be ignored simply because a two-word non-codified heading in SLUSA labeled it a "conforming amendment." The "conforming" label does not strip a provision of substance. Indeed, this Court has expressly treated "conforming" amendments as substantive. *See, e.g., Burgess v. United States*, 553 U.S. 124, 134-35 (2008); *CBS, Inc. v. FCC*, 453 U.S. 367, 381 (1981). In particular, *Burgess* held that a "conforming amendment" does not mean that Congress "disavow[ed] any intent to make substantive changes" and that "[t]reating the amendments as non-substantive

[14] The third ground is also established here because of the desirability of uniform interpretation and because of federal courts' expertise in federal law and receptivity to federal statutory reforms. *See Tafflin*, 493 U.S. at 464.

would be inconsistent with their text." 553 U.S. at 134-35. The same is true here.[15]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[15] Respondents selectively quote Petitioners' Petition for Review to the California Supreme Court, omitting the italicized language: "*The situation at present is that* Congress has left in place federal and state concurrent jurisdiction of claims under the Securities Act of 1933." *See* Opp. 4 (quoting only non-italicized portion). Far from conceding anything, Petitioners were merely describing the state of the law absent a decision overruling or distinguishing *Countrywide*.

REPLY APPENDIX A

Iron Workers Dist. Council of New England Pension Fund v. MoneyGram Int'l, Inc., No. 1:15-cv-00402-LPS, 2016 WL 4585975 (D. Del. Sept. 2, 2016) (state courts lack subject matter jurisdiction); *Westmoreland Cty. Emp. Ret. Fund v. Inventure Foods Inc.*, No. CV-16-01410-PHX-SMM, slip op. (D. Ariz. Aug. 10, 2016) (state courts have subject matter jurisdiction); *Rivera v. Fitbit, Inc.*, Nos. 16-cv-02890-SI, 16-cv-03381-SI, 2016 U.S. Dist. LEXIS 98202 (N.D. Cal. July 27, 2016) (same); *Pytel v. Sunrun Inc.*, Nos. C 16-2566-CRB, C 16-2568-CRB, C 16-02569-CRB, C 16-02570-CRB, C 16-02572-CRB, C 16-202573-CRB, 2016 U.S. Dist. LEXIS 90417 (N.D. Cal. July 11, 2016) (same); *Carlson v. Ovascience, Inc.*, No. 15-14032-WGY, 2016 WL 3002368 (D. Mass. May 23, 2016) (same); *Oklahoma Police Pension & Ret. Sys. v. Sientra, Inc.*, Nos. 5:15-cv-05549-EJD, 5:15-cv-05550-EJD, 5:15-cv-05553, 2016 U.S. Dist. LEXIS 67563 (N.D. Cal. May 20, 2016) (same).

REPLY APPENDIX B

NEW '33 ACT CLASS ACTIONS FILED IN CALIFORNIA STATE COURTS AFTER SLUSA

AFTER COUNTRYWIDE:

	Filing Date	Case Name	Case No.
1.	Sept. 1, 2016	Ramsay v. Pure Storage, Inc.	San Mateo County 16CIV01183
2.	Aug. 19, 2016	Jackie888, Inc. v. Tokai Pharmaceuticals, Inc.	San Francisco County CGC-16-553796
3.	Aug. 11, 2016	Bloom v. Goldman, Sachs & Co. (SunEdison, Inc.)	San Mateo County 16CIV00884
4.	Aug. 5, 2016	Torres v. Kryeziu (Code Rebel Corporation)	Los Angeles County BC629838

RECORD AND BRIEFS.

Supreme Court, U.S.
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No. 15-1439

In the Supreme Court of the United States

CYAN, INC., ET AL., PETITIONERS

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether state courts lack subject matter jurisdiction over "covered class actions," 15 U.S.C. 77v(a), that allege only claims under the Securities Act of 1933.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. In 1995, prompted by concern that the salutary purposes of private securities litigation were being "undermined by * * * abusive and meritless suits," H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 31 (1995), Congress enacted the Private Securities Litigation Reform Act (PSLRA), Pub. L. No. 104-67, 109 Stat. 737. The PSLRA established various reforms, including heightened pleading standards and an automatic stay of discovery, that apply to certain private securities-fraud actions. See, *e.g.*, 15 U.S.C. 77z-1.

After the PSLRA was enacted, however, Congress observed that "a number of securities class action lawsuits have shifted from Federal to State courts," which "has prevented that Act from fully achieving its objectives." Securities Litigation Uniform Standards Act of 1998 (SLUSA), Pub. L. No. 105-353, § 2(2) and (3), 112 Stat. 3227. Congress therefore enacted SLUSA to "prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the [PSLRA]." Congress sought to accomplish that goal by creating "national standards for securities class action lawsuits involving nationally traded securities, while preserving the appropriate enforcement powers of State securities regulators." SLUSA § 2(5), 112 Stat. 3227; see *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 82 (2006).

As relevant here, Congress amended the Securities Act of 1933 (1933 Act), 15 U.S.C. 77a *et seq.*, and other provisions of the securities laws in three respects. First, Congress prevented private plaintiffs from repleading certain federal securities-fraud class actions under state law. Section 77p(b) of Title 15 provides that "[n]o covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging" either "(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security" or "(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." 15 U.S.C. 77p(b); see 15 U.S.C. 77p(d) (Section 77p(b) inapplicable in certain circumstances).

Section 77p(f)(2) defines the term "covered class action" to include certain suits in which damages are sought on behalf of more than 50 people. 15 U.S.C. 77p(f)(2). The term "covered security" is defined to include a security listed on a regulated U.S. national exchange. See 15 U.S.C. 77p(f)(3) (cross-referencing 15 U.S.C. 77r(b)). Taken together, those provisions prevent any court, state or federal, from hearing securities class actions brought under state law for false statements, omissions, or deceptive conduct in connection with a covered security.

Second, Congress recognized that plaintiffs might attempt to bring such actions in state court, and it was apparently concerned that state courts would not adequately enforce Section 77p(b)'s limitation. SLUSA therefore amended the 1933 Act to permit removal of such actions to federal court. Under Section 77p(c), "[a]ny covered class action brought in any State court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b)." 15 U.S.C. 77p(c). SLUSA also amended language governing removal in the 1933 Act's general jurisdictional provision, 15 U.S.C. 77v(a). That provision formerly barred removal of cases arising under the 1933 Act, but SLUSA carved out an exception for removal of covered class actions pursuant to Section 77p(c) by adding the language italicized below. See 15 U.S.C. 77v(a) ("*Except as provided in section 77p(c) of this title*, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.") (emphasis added).

Third, Congress amended the language in Section 77v(a) that provides for concurrent federal- and state-court jurisdiction over suits to enforce the 1933 Act. As amended by SLUSA, Section 77v(a) provides that "[t]he district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this subchapter * * * and, concurrent with State and Territorial courts, *except as provided in section 77p of this title with respect to covered class actions*, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter." 15 U.S.C. 77v(a) (emphasis added); see SLUSA § 101(a)(3), 112 Stat. 3230 (SLUSA amendment adding italicized language).

2. a. In 2014, respondents brought a class-action suit against petitioners in California superior court.[1] The complaint alleges violations of provisions of the 1933 Act that govern disclosures made in registration statements and prospectuses. See Pet. 9 (citing 15 U.S.C. 77k, 77*l*(a)(2), and 77*o*); see generally *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 570-571 (1995). The complaint does not allege any state-law claims. See Pet. 9.

Petitioners moved for judgment on the pleadings for lack of subject-matter jurisdiction. On October 23, 2015, the superior court denied the motion. See Pet. App. 1a-6a. The court explained that its "hands [were] tied by" the decision in *Luther* v. *Countrywide Financial Corp.*, 125 Cal. Rptr. 3d 716 (Ct. App.), cert. denied, 565 U.S. 1080 (2011). Pet. App. 5a; see *id.* at 6a.

In *Luther*, the California Court of Appeal (Second District) held that concurrent jurisdiction of a covered

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[1] The parties appear to agree that the suit is a "covered class action," and that the securities in question are "covered securities," within the meaning of SLUSA. See Pet. 9.

class action alleging only claims under the 1933 Act "survived the amendments" that SLUSA had made to that statute. *Luther*, 125 Cal. Rptr. 3d at 721. The defendant in *Luther* argued that 15 U.S.C. 77v(a), which establishes concurrent jurisdiction in state and federal courts "except as provided in section 77p of this title with respect to covered class actions," *ibid.*, should be read to refer to "the definition of covered class action in section 77p(f)(2)" and thus to "create[] an exception to concurrent jurisdiction for *all* covered class actions." 125 Cal. Rptr. 3d at 719. The court rejected that argument, explaining that "Section 77v does not say 'except as provided in section 77p(f)(2),' the definition of covered class action. Instead, it refers to all of section 77p, not just the definitional provision." *Id.* at 721; see *id.* at 721-722.

The California Court of Appeal in *Luther* stated that it would "look to all of section 77p[] and see what it provides 'with respect to covered class actions,'" and that Section 77p does not "provide[]" anything that is relevant to a covered class action alleging only federal-law claims. 125 Cal. Rptr. 3d at 720; see *id.* at 718 (stating that "[t]his case, which is not based on the statutory or common law of any state, is not precluded" under Section 77p(b)). The court acknowledged that SLUSA "was enacted to stem the shift from federal to state courts and to 'prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of' the [PSLRA]." *Id.* at 722 (quoting *Dabit*, 547 U.S. at 81-82). It reasoned, however, that "an intent to prevent *certain* class actions does not tell us that this class action, or all securities class actions[,] must be brought in federal court." *Ibid.*

b. On December 2, 2015, petitioners filed a petition for a writ of mandate, prohibition, or other relief in the California Court of Appeal (First District). See Pet. 10. The court denied the petition without an opinion. See Pet. App. 15a.

On December 18, 2015, petitioners filed a petition for review in the Supreme Court of California. See Pet. 10. That petition, too, was denied without opinion. See Pet. App. 16a.

DISCUSSION

This case presents a difficult interpretive issue that has generated confusion in lower courts. Although the California trial court correctly held that SLUSA did not divest it of jurisdiction over respondents' 1933 Act suit, this Court's review is warranted to ensure that the statute is applied uniformly throughout the nation. In resolving the jurisdictional question presented in the petition, the Court can consider the relationship between the jurisdictional provisions in Sections 77p(b) and 77v(a) and the removal provision in Section 77p(c), which authorizes removal of certain covered class actions from state to federal court. Properly construed, Section 77p(c) authorizes removal of 1933 Act suits like this one, and it provides appropriate protection against the use of state-court lawsuits to circumvent the PSLRA's substantive and procedural safeguards.

A. Sections 77p(b) And 77v(a) Allow State-Court Jurisdiction Over 1933 Act Suits

1. The provision directly at issue in this case, 15 U.S.C. 77v(a), defines the jurisdiction of federal and state courts over 1933 Act claims. Section 77v(a) states that "[t]he district courts of the United States

* * * shall have jurisdiction of offenses and violations under this subchapter * * * and, concurrent with State and Territorial courts, *except as provided in section 77p of this title with respect to covered class actions*, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter." *Ibid.* (emphasis added). The parties dispute the meaning of the italicized language, which this brief refers to as the "except" clause.

That "except" clause is most naturally read as a limitation on the preceding phrase dealing with the concurrent jurisdiction of state courts. In other words, federal courts "shall have jurisdiction * * * of all suits in equity and actions at law brought to enforce" obligations created by the 1933 Act, and the federal jurisdiction in question shall be "concurrent with" state courts, "except as provided in section 77p * * * with respect to covered class actions." 15 U.S.C. 77v(a). Read in that way, one would expect Section 77p to limit in some way state-court jurisdiction over covered class actions brought under the 1933 Act.

The operative provision of Section 77p, however, contains no such limitation. Section 77p(b) provides that certain covered class actions "based upon the statutory or common law of any *State* or subdivision thereof" may not be maintained "in any State *or* Federal court." 15 U.S.C. 77p(b) (emphasis added). By its terms, that provision addresses only certain class actions brought under state law, and it has no meaningful application to the 1933 Act suits that are referenced in Section 77v(a). Moreover, Section 77p(b) precludes both state and federal courts from hearing the specified state-law class actions. Section 77p(b) therefore does not limit the concurrent state-court

jurisdiction over 1933 Act claims that Section 77v(a) generally provides. Nor does any other provision within Section 77p divest state courts of jurisdiction over any category of 1933 Act claims.

2. a. In the face of that ambiguity, the parties offer competing explanations for Section 77v(a)'s "except" clause. According to petitioners (Pet. 30), the "except" clause's cross-reference to Section 77p refers to the *definition* of "covered class action" set forth in Section 77p(f). That provision defines a covered class action as a suit in which more than 50 people seek damages and common questions predominate—it does not look to whether the action is brought under federal or state law. Under petitioners' approach, the "except" clause divests state courts of jurisdiction over "all suits in equity and actions at law brought to enforce" the 1933 Act that fall within Section 77p(f)'s definition of "covered class action." 15 U.S.C. 77v(a). Petitioners' approach has one virtue: it preserves the "except" clause as a limit on the concurrent jurisdiction of state courts.

But it does so by ignoring the statutory text. According to petitioners, Section 77v(a)'s "except" clause is an exception to the general rule that federal and state courts have concurrent jurisdiction "of all suits in equity and actions at law brought to enforce any liability or duty created by" the 1933 Act. 15 U.S.C. 77v(a). But neither Section 77p(f)'s definition of "covered class action," nor any other provision within Section 77p, can colorably be read to divest the California courts of jurisdiction over respondents' 1933 Act claims. Petitioners identify nothing in Section 77p that even arguably "provide[s]" an exception to the general rule of concurrent jurisdiction. In arguing

that Section 77v(a)'s "except" clause imposes limits on state-court jurisdiction that are not "provided in" Section 77p itself, petitioners urge a reading of the clause that its language will not bear.

Petitioners' reading of the "except" clause would also entail practical consequences that seem inconsistent with SLUSA's overall structure and purposes. The state-law claims that are barred by Section 77p(b) all involve allegations of specified misconduct "in connection with the purchase or sale of a covered security." 15 U.S.C. 77p(b)(1) and (2); see 15 U.S.C. 77p(f)(3) (defining the term "covered security" through cross-reference to 15 U.S.C. 77r(b), which refers generally to securities that are listed on regulated national exchanges). Section 77p(f)'s definition of "covered class action," however, does not limit that term to suits involving covered securities. Under petitioners' approach, the "except" clause would divest state courts of jurisdiction over *all* "covered class actions" that are brought under the 1933 Act, including those that do *not* involve covered securities. There is no evident reason that Congress would have wished SLUSA's divestiture of state-court jurisdiction to sweep more broadly with respect to 1933 Act suits than with respect to state-law claims.

In another respect as well, petitioners' reading would cause the "except" clause to encompass a range of federal suits that is broader than the range of state-law actions that Section 77p(b) itself precludes. Section 77p(b) bars federal and state courts from adjudicating state-law covered class actions that allege "an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security," or allege "that the defendant used or em-

ployed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." 15 U.S.C. 77p(b)(1) and (2). SLUSA's definition of "covered class action," however, is not limited to suits that allege those forms of wrongdoing. Petitioners' approach thus would bar state courts from adjudicating covered class actions under the 1933 Act even in circumstances where comparable state-law class actions could go forward. See 15 U.S.C. 77e, 77*l*(a)(1) (provisions of 1933 Act permitting a purchaser to sue a seller for offering or selling an unregistered security that is required to be registered).

b. For their part, respondents do not clearly articulate (Br. in Opp. 16-17) what the "except" clause is meant to accomplish or why it appears in Section 77v(a). Respondents argue that the "except" clause "addresses only" the state-law actions that are barred by Section 77p(b). *Id.* at 17. But the "except" clause applies to suits "brought to enforce any liability or duty created by this subchapter," *i.e.*, created by the 1933 Act. 15 U.S.C. 77v(a). The clause thus applies exclusively or at least almost exclusively to *federal-law* actions. Respondents do not explain why Congress would have used the language it did if it had in mind the actions "based upon the statutory or common law of any State or subdivision thereof" that Section 77p(b) addresses. 15 U.S.C. 77p(b).[2]

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[2] This Court recently recognized, in construing a similarly worded securities-law provision, that the phrase "brought to enforce any liability or duty created by" federal law can encompass a limited set of state-law claims. 15 U.S.C. 77v(a); see *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Manning*, 136 S. Ct. 1562 (2016) (discussing 15 U.S.C. 78aa(a)). That will be so when state law creates the cause of action but proof of a federal-law violation

c. Although neither petitioners nor respondents have offered a persuasive explanation of Congress's reason for enacting the "except" clause, respondents have the better of the interpretive dispute. Respondents' inability to explain *why* Congress enacted the "except" clause is a less significant failing than is petitioners' inability to reconcile its interpretation with the statute's text. Under Section 77v(a), federal and state courts may exercise concurrent jurisdiction over 1933 Act claims "except as provided in section 77p * * * with respect to covered class actions." 15 U.S.C. 77v(a). Petitioners identify nothing in Section 77p that even arguably "provide[s]" an exception to the general rule of concurrent jurisdiction and thereby divests the California courts of power to adjudicate respondents' current claims. As a textual matter, that analysis provides a fully sufficient basis for the state trial court's exercise of jurisdiction here, despite the uncertainty as to what problem Congress was seeking to address when it enacted the "except" clause.

There are, however, at least two possible explanations for why Congress enacted the "except" clause. First, Congress may have been concerned about hy-

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is a necessary element of the plaintiff's state-law claim. *Id.* at 1569; see *id.* at 1570 (referring to hypothetical case "in which a state-law cause of action is 'brought to enforce' a duty created by the Exchange Act because the claim's very success depends on giving effect to a federal requirement"). A state-law covered class action asserting claims of that nature could be encompassed both by Section 77v(a)'s "except" clause (if the success of the state-law claim depended on proof of a 1933 Act violation) and by Section 77p(b)'s preclusion rule. Respondents do not suggest, however, and there is no evident reason to suppose, that Congress designed the "except" clause for that "special and small category." *Id.* at 1569 (quoting *Gunn* v. *Minton*, 133 S. Ct. 1059, 1064 (2013)).

brid class actions that contain both 1933 Act claims and state-law claims within the scope of Section 77p(b)—*i.e.*, claims under state law for false statements, omissions, or deceptive conduct in connection with a covered security. Because Section 77v(a) grants concurrent jurisdiction over "all *suits* in equity and *actions* at law" brought to enforce the 1933 Act, 15 U.S.C. 77v(a) (emphasis added), plaintiffs could have attempted to argue that Section 77v(a) provides state courts with jurisdiction over hybrid class actions in their entirety. The "except" clause makes clear that, although state courts retain concurrent jurisdiction over the 1933 Act claims, state courts may not entertain any state-law claims barred by Section 77p(b).

Second, Congress may have added the "except" clause to Section 77v(a) in a more general excess of caution, as a way of ensuring that nothing in the 1933 Act's general jurisdictional provision would be taken to supersede SLUSA's limits on state-court jurisdiction. Cf., *e.g.*, *Marx* v. *General Revenue Corp.*, 133 S. Ct. 1166, 1176 (2013) (explaining that language may be included in a statute to "remov[e] any doubt," and citing cases to that effect). That is particularly likely in the context of SLUSA, which was enacted to block "bypass of" the PSLRA. *Kircher* v. *Putnam Funds Trust*, 547 U.S. 633, 636 (2006). And Congress could reasonably take that step even if did not have in mind any particular circumstance in which Sections 77p and 77v(a) would produce conflicting results. In any event, uncertainty as to Congress's reasons for enacting the "except" clause provides no sound basis for giving the clause a reading broader than its text will support.

B. Section 77p(c) Authorizes Removal To Federal Court Of Covered Class Actions That Are Brought Under The 1933 Act And Allege The Types Of Misconduct That Are Described In Section 77p(b)

Petitioners contend (*e.g.*, Pet. 25, 27) that, unless Section 77v(a)'s "except" clause is read to divest state courts of jurisdiction over 1933 Act suits like these, SLUSA cannot achieve its purpose of preventing circumvention of the PSLRA's substantive and procedural requirements. Petitioners are correct that the efficacy of those requirements depends on defendants' access to a federal forum. Petitioners are wrong, however, in assuming that the "except" clause provides the *only* statutory mechanism for ensuring such access in 1933 Act suits. In particular, petitioners ignore the fact that SLUSA also established an exception to what had previously been a categorical bar on removal to federal court of 1933 Act suits filed in state court. If SLUSA is properly construed to authorize removal of state-court suits like this one, Congress's policy judgments can be vindicated without adopting petitioners' atextual reading of the "except" clause.

1. Before SLUSA was enacted, Section 77v(a) categorically barred removal of any "case arising under [the 1933 Act] and brought in any State court of competent jurisdiction." 15 U.S.C. 77v(a) (1994). As amended by SLUSA, however, that removal bar now applies "[e]xcept as provided in Section 77p(c) of this title." 15 U.S.C. 77v(a). Section 77p(c), which was also added by SLUSA, in turn provides that "[a]ny covered class action brought in any State court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the

district in which the action is pending, and shall be subject to subsection (b)." 15 U.S.C. 77p(c).

Section 77p(c) is best understood to permit removal of "any covered class action brought in any State court involving a covered security" and alleging the type of misconduct that is described in Section 77p(b)—*i.e.*, "(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security" or "(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." 15 U.S.C. 77p(b) and (c). With respect to the state-law suits that are precluded altogether by Section 77p(b), Congress authorized removal under Section 77p(c) in order to ensure that the preclusion determination could be made by a federal court if the defendant so requested. Because Congress was unwilling to leave those preclusion determinations to state courts alone, it would not likely have denied defendants access to a federal forum for adjudication of the merits of analogous 1933 Act claims.

In many covered class actions asserting 1933 Act claims, including in this suit, removal under Section 77p(c) would give defendants substantially the same protection against state-court circumvention of the PSLRA's requirements that petitioners' interpretation of the "except" clause in Section 77v(a) would provide. The most significant practical difference between the two approaches is that petitioners construe the "except" clause to bar state-court adjudication of *all* covered class actions brought to enforce the 1933 Act. Section 77p(c), by contrast, does not authorize removal of covered class actions that do not involve covered securities, or that allege a type of misconduct

other than the types described in Section 77p(b)(1) and (2). Cf. pp. 9-10, *supra*. Allowing plaintiffs to litigate such 1933 Act claims in state court, however, is consistent with the congressional policy judgments reflected in SLUSA, because SLUSA does not disturb state courts' authority to adjudicate *state*-law claims having those characteristics.[3]

2. The Court's decision in *Kircher*, *supra*, does not foreclose this interpretation of Section 77p(c). In *Kircher*, the Court held that "an order remanding a case removed under" SLUSA is not appealable under 28 U.S.C. 1447(d), which "bars review of district court orders remanding for lack of subject-matter jurisdiction." 547 U.S. at 636, 638; see *id.* at 637. In the course of its analysis, the Court stated that removal under Section 77p(c) is "confined to cases 'set forth in subsection (b),' namely, those with claims of untruth, manipulation, and so on." *Id.* at 642 (internal citation omitted); see *ibid.* (the "set forth in subsection (b)"

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[3] Because petitioners did not seek to remove this case to federal court, but instead asked the state court to dismiss on jurisdictional grounds, the question whether removal under Section 77p(c) would have been permissible is not squarely presented here. In construing Section 77v(a)'s "except" clause, however, the Court could and should consider the structure and purposes of the overall statutory scheme. In particular, the force of petitioners' concern about the potential for state-court circumvention of PSLRA requirements depends substantially on whether SLUSA provides alternative protections against such circumvention. In resolving this case, the Court therefore could provide helpful guidance to lower courts about the scope of Section 77p(c)'s removal authorization. Moreover, as explained below, if petitioners had sought removal, the district court's order might well have evaded appellate review, whether the court granted or denied the removal request. See p. 18, *infra*. The fact that petitioners did not seek removal therefore should not be deemed an obstacle to this Court's review.

language "has no apparent function unless it limits removal to covered class actions involving claims like untruth or deception"). Those descriptions of Section 77p(c)'s coverage encompass 1933 Act claims that allege the types of misconduct described in Section 77p(b)(1) and (2).

On the next page of its opinion, however, the Court stated that "removal and jurisdiction to deal with removed cases is limited to those precluded by the terms of subsection (b)." *Kircher*, 547 U.S. at 643; see *id.* at 643-644 (stating that "removal jurisdiction under subsection (c)" should be "understood to be restricted to precluded actions defined by subsection (b)"). Because Section 77p(b) bars adjudication only of claims "based upon the statutory or common law of any State or subdivision thereof," 15 U.S.C. 77p(b), some courts have read *Kircher*'s reference to "precluded" actions to mean that removal under Section 77p(c) is limited to actions that allege state-law claims. See, *e.g.*, *Electrical Workers Local #357* v. *Clovis Oncology, Inc.*, 185 F. Supp. 3d 1172, 1176, 1179-1180 (N.D. Cal. 2016).

Because *Kircher* involved only state-law claims, see 547 U.S. at 637, the difference between those two articulations of the removal standard had no practical significance in that case. Section 77p(c) can reasonably be construed, however, to encompass both state- and federal-law covered class actions that allege the kinds of misconduct described in Section 77p(b)(1) and (2), even though a federal-law suit of that character would not be precluded by Section 77p(b). That construction, which ensures that defendants in such 1933 Act suits will receive the PSLRA's protections, is more faithful to SLUSA's overall structure and pur-

poses than is an interpretation that limits removal to state-law claims. *Kircher* should not be read to foreclose its adoption.

C. This Is An Appropriate Vehicle For Resolving Confusion In The Lower Courts

1. This Court's review is warranted in light of the substantial confusion in the lower courts about whether state courts have jurisdiction over covered class actions that allege only 1933 Act claims. As the petition explains (Pet. 11-13 & Pet. App. 25a-28a), some federal district courts, including a number of courts in New York, have ruled that Section 77v(a)'s "except" clause divests state courts of jurisdiction over covered class actions brought to enforce the 1933 Act.[4] Other district courts, including a number of courts in California, have reached the opposite conclusion.[5]

Contrary to respondent's suggestion (Br. in Opp. 12-14), the confusion in the lower courts has not dissipated in recent years. Compare, *e.g.*, *Iron Workers Dist. Council of New England Pension Fund* v.

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[4] See, *e.g.*, *Hung* v. *iDreamSky Tech. Ltd.*, No. 15-cv-2514, 2016 WL 299034, at *2-*4 (S.D.N.Y. 2016) ("construction of § 77v(a) has split federal district courts"); *Knox* v. *Agria Corp.*, 613 F. Supp. 2d 419, 424-425 (S.D.N.Y. 2009); see also *Rovner* v. *Vonage Holdings Corp.*, No. 07-cv-178, 2007 WL 446658, at *2-*4 (D.N.J. 2007) ("a split exists among the districts"); Pet. 12 n.12 (noting disagreement within certain districts).

[5] See, *e.g.*, *Electrical Workers Local #357*, 185 F. Supp. 3d at 1178-1184; *Plymouth Cnty. Ret. Sys.* v. *Model N, Inc.*, No. 14-cv-4516, 2015 WL 65110, at *2-*3 (N.D. Cal. 2015) (collecting cases from California district courts); see also *Fortunato* v. *Akebia Therapeutics, Inc.*, 183 F. Supp. 3d 326, 332 (D. Mass. 2016) (discussing "split in the case law"); *Luther* v. *Countrywide Fin. Corp.*, 125 Cal. Rptr. 3d 716, 718-720 (Ct. App.), cert. denied, 565 U.S. 1080 (2011); Pet. 12 n.12.

MoneyGram Int'l, Inc., No. 15-cv-402, 2016 WL 4585975, at *5-*7 (D. Del. 2016) (denying motion to remand on the ground that state courts lack jurisdiction over "*all* covered class actions, as they are defined in * * * 15 U.S.C. § 77p(f)," and noting conflict among district-court decisions), with *Westmoreland Cnty. Emp. Ret. Fund* v. *Inventure Foods Inc.*, No. CV-16-01410, 2016 WL 7654657, at *3 (D. Ariz. 2016) (granting motion to remand and ruling that "the Securities Act [of 1933], as amended by the SLUSA, does not mandate that Securities Act lawsuits be tried exclusively in federal court"). Parties to covered class actions brought to enforce the 1933 Act thus continue to be subject to different jurisdictional rules in different courts and different parts of the country.

2. It is true that no conflict exists among federal courts of appeals or state courts of last resort. See Sup. Ct. R. 10. But as petitioners explain, there are significant obstacles to appellate resolution of the question presented in this case. If a district court remands a case to state court on the ground that the state court has jurisdiction over the case, that order is generally unreviewable. See 28 U.S.C. 1447(d). And if a district court refuses to remand a 1933 Act covered class action on the ground that the state court lacks jurisdiction over the case, that order is non-final and generally not subject to review until after final judgment—and securities cases virtually always settle before entry of such a judgment. See Pet. 14.[6]

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[6] We are aware of one case pending in a federal court of appeals that raises the question whether Section 77v(a) eliminated state courts' concurrent jurisdiction over covered class actions raising only 1933 Act claims. See *Ellis* v. *Natera, Inc., et al.*, No. 16-16576 (9th Cir. docketed Mar. 29, 2016) (consolidated with Nos. 16-16577,

Given the frequency with which this issue arises, the ongoing confusion in the lower courts, and the obstacles to appellate resolution of the question presented, review by this Court is warranted despite the absence of a conflict among federal courts of appeals or state courts of last resort. That rare combination of circumstances justifies the conclusion that this case presents "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

3. Respondents contend (Br. in Opp. 6-8) that this Court lacks jurisdiction because there is no final state-court judgment. See 28 U.S.C. 1257. Although the matter is not free from doubt, the better view is that jurisdiction is proper here. Moreover, as explained above, see p. 18, *supra*, the Court is unlikely to be presented with a case raising the question that does not also involve a potential objection to jurisdiction.

16-16578, and 16-16579); see also C.A. Doc. 16, at 5-7, *Ellis*, *supra* (No. 16-16576). In that case, which involves a remand order, the court of appeals considered a motion to dismiss the appeal for lack of jurisdiction in light of 28 U.S.C. 1447(d), which generally bars appeal of such orders. See C.A. Doc. 6, at 6, *Ellis*, *supra* (No. 16-16579); see also, *e.g.*, C.A. Doc. 2, at 1-2, *Ellis*, *supra* (No. 16-16576) (ordering appellants to show cause why appeal should not be dismissed). The court denied the motion without discussion. See C.A. Doc. 10, at 2-3, *Ellis*, *supra* (No. 16-16576); see also *ibid.* (discharging orders to show cause). Briefing in the case is still underway, and appellants' opening brief includes an argument that appellate review of the remand order is proper. See C.A. Doc. 16, at 34, 44 (arguing that the "remand orders were final and appealable" because district court remanded a case over which federal courts have exclusive jurisdiction) (capitalization altered); see also *id.* at 5, 36, 46; C.A. Doc. 22, at 2-3, *Ellis*, *supra* (No. 16-16576) (answering brief due by June 23, 2017).

In the California trial court, petitioners moved for judgment on the pleadings, contending that the court lacked jurisdiction to hear the case under Section 77v(a). See Pet. App. 1a-6a. The trial court denied that motion. See *ibid.* Petitioners then petitioned the California Court of Appeal for a "writ of mandate and/or prohibition or other relief," naming the trial court as respondent and arguing that the trial court lacked jurisdiction under SLUSA. Pet. for Writ of Mandate and/or Prohibition or Other Relief (Dec. 2, 2015); see Pet. App. 15a. Under California law, that petition initiated an original proceeding on the topic of the trial court's jurisdiction. See, *e.g.*, 8 B.E. Witkin, *California Procedure* § 164 (5th ed. 2008). The California Court of Appeal subsequently denied the petition, and the Supreme Court of California denied discretionary review of that decision. See Pet. App. 15a-16a; Cal. R. Ct. 8.500(b). The original proceeding initiated by the petition therefore has now been finally terminated.

This Court has held that those circumstances sufficiently establish finality for purposes of 28 U.S.C. 1257. In *Bandini Petroleum Co.* v. *Superior Court*, 284 U.S. 8 (1931), the Court considered the finality question in a case in which a "proceeding for a writ of prohibition" was initiated in a California District Court of Appeal to determine the jurisdiction of a state Superior Court, the Court of Appeal denied the writ, and the California Supreme Court denied further review. *Id.* at 12-14. This Court ruled that "[t]he proceeding for a writ of prohibition is a distinct suit, and the judgment finally disposing of it is a final judgment within the meaning of § 237(a) of the Judicial Code." *Id.* at 14; see, *e.g.*, *Rescue Army* v. *Munic-*

ipal Court, 331 U.S. 549, 565-568 (1947) (reaching same result with respect to California "prohibition proceeding" in a criminal case); *Madruga* v. *Superior Court*, 346 U.S. 556, 557 n.1 (1954); *Fisher* v. *District Court*, 424 U.S. 382, 385 n.7 (1976) (per curiam) (collecting cases); Stephen M. Shapiro et al., *Supreme Court Practice* § 3.8, at 171-172 (10th ed. 2013) (collecting cases).

That leaves only the question whether the California Court of Appeal rejected the petition in this case on a federal ground or on an independent and adequate state ground. See generally *Herb* v. *Pitcairn*, 324 U.S. 117, 125-126 (1945). Some uncertainty exists on that question, because the decision of that court does not set forth any reasoning. It simply states that "[t]he petition for writ of mandate, prohibition or other relief is denied." Pet. App. 15a.

This Court has previously exercised jurisdiction over a case in which a writ of prohibition was denied without opinion. See *Michigan Cent. R.R.* v. *Mix*, 278 U.S. 492, 494 (1929) (stating that judgment denying the writ was "final within the meaning of § 237(a) of the Judicial Code"). Here, the arguments made to the California Court of Appeal (as well as to the California Supreme Court) centered on the federal issue. See generally *Foster* v. *Chatman*, 136 S. Ct. 1737, 1746 n.3 (2016) (explaining that the Court may "turn to other parts of the record" if "the state court opinion fails to yield precise answers as to the grounds of decision") (quoting Shapiro § 3.23, at 211). And in acting on the petition, the Court of Appeal presumably looked to the decision of its fellow intermediate appellate court (on which the trial court here entirely relied, see Pet. App. 1a-6a), which had previously held that state

courts continue after SLUSA to have concurrent jurisdiction over covered class actions that raise only federal securities-law claims, see *Luther*, 125 Cal. Rptr. 3d at 720-721. Cf. *Ylst* v. *Nunnemaker*, 501 U.S. 797, 804 (1991) (stating, in habeas context, that a court attempting to determine whether an "unexplained order[]" rests on federal or state grounds should "look[] through" to "the last reasoned decision"); see, *e.g.*, *Shaw* v. *Superior Court*, 393 P.3d 98, 102-103 (Cal. 2017) (explaining that, in California, "lack of jurisdiction" is an appropriate ground for the grant of an extraordinary writ). For those reasons, this case provides an appropriate vehicle to resolve the confusion over the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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CYAN, INC. ET AL.,

Petitioners,

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, ET AL.,

Respondents

On Petition for a Writ of Certiorari
To The Court of Appeal of The State Of California,
First Appellate District

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici are prominent law professors whose scholarship and teaching focuses on the federal securities laws. This brief reflects the consensus of *amici* that this Court should grant Cyan, Inc.'s Petition for Writ of Certiorari to resolve whether the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") grants federal courts exclusive jurisdiction over covered class actions that allege only claims under the Securities Act of 1933 ("33 Act").

This question has split federal district courts, which have addressed the question on motions to remand in cases that had been removed to federal court. Because remand orders are not appealable, federal circuit courts have not had, and will not have, the opportunity to address the issue. The result is that covered class actions alleging only 33 Act claims are brought exclusively in federal court in some jurisdictions, and primarily in state court in other jurisdictions. *Amici* believe that this could not have been the result Congress intended when

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[1] Pursuant to Supreme Court Rule 37.2(a), *amici curiae* submit this brief in support of the petition for writ of certiorari. As required by Rule 37.2(a), amici provided 10 days' notice to all parties of their intent to file a brief as *amici curiae*. All parties have consented to the filing. Pursuant to Supreme Court Rule 37.6, *amici curiae* certify that no party or counsel for a party authored any portion of this brief or made a monetary contribution intended to fund its preparation or submission. No person other than *amici curiae*, its members, or its counsel have made such a monetary contribution.

passing SLUSA. Each individual *amicus*, however, may not endorse every argument made in this brief.

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SUMMARY OF ARGUMENT

Dozens of district courts across the country have issued conflicting decisions on whether state courts have jurisdiction to hear class actions asserting claims solely under the 33 Act in light of the jurisdictional amendments adopted in SLUSA. District courts in five circuits have held that SLUSA divested state courts of jurisdiction over such cases, while the district courts of four other circuits have held the opposite. Because these decisions have issued as remand orders, they are not appealable. Thus, despite more than 50 district court rulings, there are *no* decisions on this issue from the federal circuit courts of appeals, and there likely never will be. This case presents the rare situation where a split among the district courts justifies this Court's review.

The inconsistent lower court rulings have had a profound effect on the litigation of class actions alleging 33 Act violations. Most notably, filing of these cases in California state courts has rapidly increased. State courts do not apply the Private Securities Litigation Reform Act of 1995 ("PSLRA"). The result—as shown in Appendices A and B—is that state and federal courts have markedly different dismissal rates. Between 2011 and 2015, federal courts dismissed 29% of cases filed with only 33 Act claims, whereas state courts in California, for example, dismissed only two of 25 such cases without leave to amend. This Court has long recognized the *in terrorem* effect of class actions brought on behalf of investors under the federal

securities laws.[2] Congress passed the PSLRA and SLUSA to dampen this effect. Yet the inconsistent application of SLUSA's jurisdictional provisions promotes rather than deters *in terrorem* settlements. This Court should grant review to give guidance to district courts consistent with the purposes of SLUSA and the PSLRA.

ARGUMENT

I. THIS CASE PRESENTS AN EXTRAORDINARY CIRCUMSTANCE IN WHICH A SPLIT AMONG FEDERAL DISTRICT COURTS IS SUFFICIENT TO WARRANT A GRANT OF CERTIORARI BECAUSE A CIRCUIT SPLIT IS DE FACTO IMPOSSIBLE.

A split among the United States courts of appeal has long been a factor this Court has considered in deciding whether to grant review. SUP. CT. R. 10(a). While there is no such split here, dozens of federal district judges are divided on the question presented, and this case presents the rare situation in which differing decisions by the district courts justify this Court's review.

There is a dramatic split among the district courts regarding state jurisdiction of 33 Act class actions after SLUSA. The majority of district courts

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[2] *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740, 741 (1975); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005).

in the Second,[3] Third,[4] Fourth,[5] Fifth,[6] and Tenth[7] circuits have held that SLUSA grants federal courts exclusive jurisdiction over 33 Act cases and have denied remand when defendants have removed the cases to federal court. However, the majority of district courts in the First[8], Seventh,[9] Ninth,[10] and

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[3] *Rubin v. Pixelplus Co., Ltd.*, No. 06-CV-2964 (ERK), 2007 WL 778485 (E.D.N.Y. Mar. 13, 2007) (denying remand); *In re Fannie Mae 2008 Sec. Litig.*, Nos. 08 Civ. 7831(PAC), 09 Civ. 1352(PAC), 2009 WL 4067266 (S.D.N.Y. Nov. 24, 2009) (same); *Knox v. Agria Corp.*, 613 F. Supp. 2d 419 (S.D.N.Y. 2009) (same); *Hung v. Idreamsky Technology Limited*, 15-cv-03794 (S.D.N.Y. 2016) (same); *but see Bernd Bildstein IRRA v. Lazard Ltd.*, No. 05 CV 3388(RJD)(RML), 2006 WL 2375472 (E.D.N.Y. Aug. 14, 2006) (granting remand).

[4] *Pinto v. Vonage Holdings Corp.*, No. 07-0062(FLW), 2007 WL 1381746 (D.N.J. May 7, 2007) (denying remand); *Rovner v. Vonage Holdings Corp.*, No. 07-178(FLW), 2007 WL 446658 (D.N.J. Feb. 7, 2007) (same).

[5] *Wunsch v. Am. Realty Capital Properties*, No. JFM-14-4007, 2015 WL 2183035 (D. Md. Apr. 14, 2015) (denying remand); *Lowinger v. Johnston*, No. 3:05CV316-H, 2005 WL 2592229 (W.D.N.C. Oct. 13, 2005) (same); *but see Niitsoo v. Alpha Nat. Res., Inc.*, 902 F. Supp. 2d 797 (S.D. W. Va. 2012) (granting remand).

[6] *Alkow v. TXU Corp.*, Nos. 3:02-CV-2738-K, 3:02-CV-2739-K, 2003 WL 21056750 (N.D. Tex. May 8, 2003) (denying remand); *Brady v. Kosmos Energy Ltd.*, Nos. 3:12-CV-0373-B, 3:12-CV-0781-B, 2012 WL 6204247 (N.D. Tex. July 10, 2012) (same); *but see In re Waste Mgmt., Inc. Sec. Litig.*, 194 F. Supp. 2d 590 (S.D. Tex. 2002) (granting remand).

[7] *Northumberland Cty. Ret. Sys. v. GMX Res., Inc.*, 810 F. Supp. 2d 1282 (W.D. Okla. 2011) (denying remand).

[8] *Fortunato v. Akebia Therapeutics, Inc.*, 15-13501-PBS, 2016 WL 1734073 (D. Mass. Apr. 29, 2016) (granting remand); *In re Tyco Int'l Ltd.*, 322 F. Supp. 2d 116 (D.N.H. 2004) (same).

[9] *Nauheim v. Interpublic Grp. of Companies, Inc.*, No. 02-C-9211, 2003 WL 1888843 (N.D. Ill. Apr. 16, 2003) (granting remand); *Higginbotham v. Baxter Int'l, Inc.*, No. 04 C 4909, 04 C 7096, 2005 WL 1272271 (N.D. Ill. May 25, 2005) (same).

[10] *Pipefitters Local 522 and 633 Pension Tr. Fund v. Salem Commc'ns Corp.*, No. CV 05-2730-RGK (MCx), 2005 WL 6963459 (C.D. Cal June 28, 2005) (granting remand); *Layne v. Countrywide Fin. Corp.*, No. CV 08-3262 MRP (MANx), 2008 WL 9476380 (C.D. Cal. July 8, 2008) (same); *West Virginia Laborers Tr. Fund v. STEC, Inc.*, No. SACV 11-01171-JVS (MLGx), 2011 WL 6156945, (C.D. Cal. Oct. 7, 2011) (same); *Rajasekaran v. CytRx Corp.*, No. CV 14-3406-GHK (PJWx), 2014 WL 4330787 (C.D. Cal. Aug. 21, 2014) (same); *Pac. Inv. Mgmt. Co. LLC v. AIG, Inc.*, No. SA CV 15-0687-DOC, 2015 WL 3631833 (C.D. Cal. June 10, 2015) (same); *Deutsche Bank National Trust Company v. Hagan*, No. 15-00376 JMS-KSC, 2015 WL 7720465 (D. Haw. Nov. 27, 2015) (same); *Young v. Pac. Biosciences of California*, Nos. 5:11-cv-05668 EJD, 5:11-cv-05669 EJD, 2012 WL 851509 (N.D. Cal Mar. 13, 2012) (same); *Harper v. Smart Techs., Inc*, No. C 11-5232 SBA, 2012 WL 12505217, (N.D. Cal. Sept. 28, 2012); *Toth v. Envivo, Inc.*, No. C 12-5636 CW, 2013 WL 5596965 (N.D. Cal. Oct. 11, 2013) (same); *Desmarais v. Johnson*, No. C 13-03666 WHA, No. C 13-03668 WHA, 2013 WL 5735154 (N.D. Cal. Oct. 22, 2013) (same); *Reyes v. Zynga Inc.*, No. C 12-05065 JSW, 2013 WL 5529574 (N.D. Cal. Jan 23, 2013) (same); *Plymouth Cty. Ret. Sys. v. Model N, Inc.*, No. 14-cv-04516-WHO, 2015 WL 65110 (N.D. Cal. Jan. 5, 2015) (same); *City of Warren Police and Fire Ret. Sys. v. Revance Therapeutics, Inc.*, No. 15-cv-02512-HSG, 2015 WL 5117631 (N.D. Cal. Aug. 31, 2015) (same); *Liu v. Xoom Corp.*, No. 15-CV-00602-LHK, 2015 WL 3920074 (N.D. Cal. June 25, 2015) (same); *Steinberg v. MobileIron, Inc.*, No. 15-cv-04416-VC, slip op. (N.D. Cal. Nov. 30, 2015) (same); *Cervantes v. Dickerson*, No. 15-cv-3825-PJH, 2015 WL 6163573 (N.D. Cal. Oct. 21, 2015) (same); *Buelow v. Alibaba Grp. Holding Ltd.*, No. 15-cv-05179-BLF, 2016 U.S. Dist. LEXIS 7444 (N.D. Cal. Jan. 20, 2016) (same); *Iron Workers Mid-South Pension Fund v. Terraform Glob., Inc.*, No. 15-cv-6328-BLF, 2016 WL 827374 (N.D. Cal. Mar. 3, 2016) (same); *Electrical Workers Local #357 Pension and Health & Welfare Trusts v.*

(Footnote continued on following page)

Eleventh[11] circuits have held the opposite and remanded.[12] Even within some of these circuits, district court rulings are inconsistent.[13]

Clovis Oncology, Inc., No. 16-cv-00933-EMC, 2016 WL 2592947 (N.D. Cal. 2016) (same); *Fraser v. Wuebbels*, No. 15-cv-06326-BLF, 2016 WL 827373 (N.D. Cal. Mar. 3, 2016) (same); *Oklahoma Police Pension & Retirement System v. Sientra, Inc., et al.*, No. 5:15-cv-05549-ENJ, 2016 U.S. Dist. LEXIS 67563 (N.D. Cal. May 20, 2016) (same); *Hawaii Structural Ironworkers Pension Tr. Fund v. Calpine Corp.*, No. 03CV0714BTM(JFS), 2003 WL 23509312 (S.D. Cal. Aug. 27, 2003) (same); *West Palm Beach Police Pension Fund v. CardioNet, Inc.*, No. 10cv711-L(NLS), 2011 WL 1099815 (S.D. Cal. Mar. 24, 2011) (same); *but see Brody v. Homestore, Inc.*, 240 F. Supp. 2d 1122 (C.D. Cal. 2003) (denying remand); *Lapin v. Facebook, Inc.*, Nos. C-12-3195 MMC, C-12-3196 MMC, C-12-3199 MMC, C-12-3200 MMC, C-12-3201 MMC, C-12-3202 MMC, C-12-3203 MMC, 2012 WL 3647409 (N.D. Cal. Aug. 23, 2012) (denying remand).

[11] *Steamfitters Local 449 Pension & Ret. Sec. Funds v. Quality Distrib., Inc.*, No. 8:04-cv-961-T-26MAP, 2004 WL 6246913 (M.D. Fla. June 25, 2004) (granting remand); *City of Birmingham Ret. and Relief Sys. v. MetLife, Inc.*, No. 2:12-cv-02626-HGD, 2013 WL 5526621 (N.D. Ala. Aug. 23, 2013) (same); *Martin v. BellSouth, Corp.*, No. 1:03-CV-728-WBH, 2003 WL 26476752 N.D. Ga. July 3, 2003) (same); *Williams v. AFC Enters., Inc.*, No. CIVA 103-CV-2490-TWT, 2003 WL 24100302 (N.D. Ga. Nov. 20, 2003) (same); *Unschuld v. Tri-S Sec. Corp.*, No. 1:06-CV-02931-JEC, 2007 WL 2729011 (N.D. Ga. Sept. 14, 2007) (same); *Zia v. Med. Staffing Network, Inc.*, 336 F. Supp. 2d 1306 (S.D. Fla. 2004) (same).

[12] The district courts in the 6th Circuit have split evenly on the question. *See Parker v. Nat'l City Corp.*, No. 1:08 NC 70012, 2009 WL 9152972 (N.D. Ohio Feb. 12, 2009) (granting remand); *Rosenberg v. Cliffs Nat. Res., Inc.*, No. 1:14CV1531, 2015 WL 1534033 (N.D. Ohio Mar. 25, 2015) (granting remand); *but see In re King Pharmaceuticals, Inc.*, 230 F.R.D.

(Footnote continued on following page)

This morass of rulings has led to a phenomenon that Congress could not have been intended when it enacted SLUSA—class actions alleging only 33 Act claims may be filed in state court in some jurisdictions, while other jurisdictions prohibit filing in state court. The inconsistency is particularly noticeable in the two states where most securities class action litigation is conducted: California and New York. District courts in California (particularly in the Northern District of California encompassing Silicon Valley) have generally held that 33 Act class actions are not removable to federal court, while judges in the Southern District of New York have ruled that SLUSA gives federal courts exclusive jurisdiction over such actions. In fact, one court in the Northern District of California recently ordered defendants to pay plaintiffs' attorneys' fees and costs because defendants "lacked an objectively reasonable basis for seeking removal,"[14] while a court in the Southern District of New York denied remand just a month earlier.[15]

The result has been a flood of 33 Act class actions filed in California state court. As Petitioners noted, the number of these filings has increased radically

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503 (E.D. Tenn. 2004) (denying remand); *Kulinski v. Am. Elec. Power Co., Inc.*, No. CivA.C-2-03-412, 2003 WL 24032299 (S.D. Ohio Sept. 19, 2003) (denying remand).

[13] *See supra* notes 3, 5, 6 & 10.

[14] *Iron Workers*, 2016 WL 827374, at *5-6.

[15] *Hung v. Idreamsky Technology Limited*, 15-cv-03794, 2016 U.S. Dist. LEXIS 8389 (S.D.N.Y. Jan. 25, 2016).

since 2011.[16] The rate continues to increase. In 2014, only five such cases were brought in California state court. In 2015, fourteen cases were filed. In the first five months of 2016, ten such cases have already been filed, at an annual pace of 24.[17]

Regardless of what one believes SLUSA's jurisdictional amendments did, it is indisputable that Congress could not have intended the Securities Litigation ***Uniform*** Standards Act to result in this morass of inconsistent rulings across the country. Nor could Congress have intended that cases filed in California be litigated in state court, while substantively identical cases filed in New York are litigated in federal court.

Only a decision by this Court can put an end to the inconsistencies in how district courts apply SLUSA. The federal appellate courts cannot resolve this dispute because they are unlikely to ever address the issue. The district court decisions have all been made on motions to remand cases removed from state court. Federal law prohibits appellate court review of remand orders. 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ."); *Williams v. AFC Enters. Inc.*, 389 F.3d 1185, 1191 (11th Cir. 2004) (holding district court's remand of 33 Act class action not reviewable under Section 1447(d)). Similarly, decisions from state appellate courts are also unlikely since they

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[16] Petition for Certiorari at 8.

[17] *Id.* at Appendix I.

require the appellate courts to grant discretionary appeals, which is seldom done. For example, in this case the state trial court denied Petitioners' motion for judgment on the pleadings, but both the appellate court and the California Supreme Court denied Petitioners' petitions for writs of mandate.[18] Even if state appellate courts ever were to address the issue, such rulings could themselves be inconsistent, and they would not bind federal courts. Because decisions from state high courts and federal circuit courts are extremely unlikely, the district court split justifies this Court's review.

This Court has granted certiorari in similar—and less dramatic—lower court splits. In *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981), the Court granted certiorari to resolve a conflict among five state appellate and federal district courts on the question of whether federal courts had subject matter jurisdiction over suits arising under the Outer Continental Shelf Lands Act. Similarly, in *Mistretta v. United States*, 488 U.S. 361 (1989), the Court granted certiorari in part to address the "disarray" among federal district courts regarding the constitutionality of the federal sentencing guidelines, even where federal appellate review was available. The reasons to grant certiorari are even stronger here than in *Mistretta*, where circuit courts could have addressed the issue, or *Gulf Offshore*, where far fewer district courts had addressed the issue.

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[18] The California Court of Appeal has denied writs in similar cases. *See, e.g., Audience, Inc. et al. v. Superior Court*, Case No. H040266 (Cal Ct. App. 6th Dist. May 22, 2014).

Given the important federal interest in the uniform application of the federal securities laws, divergent and contradictory district court opinions, and the increasing frequency of 33 Act cases being filed in state court, the time is ripe for guidance from this Court on this contentious issue.

II. THERE ARE SIGNIFICANT LEGAL AND ECONOMIC CONSEQUENCES IF 33 ACT CLASS ACTIONS ARE PERMITTED TO PROCEED IN STATE COURT.

The split among the district courts can have important consequences for the cases that remain in state court. State courts do not regularly apply the Private Securities Litigation Reform Act ("PSLRA"). The PSLRA includes several provisions designed to curb abusive securities litigation and *in terrorem* settlements: requirements that plaintiffs certify that they have reviewed the complaint and did not purchase the security at the direction of counsel or to participate in the suit, and that they identify other 33 Act actions in which they were a plaintiff in the last three years. 15 U.S.C. § 77z-1(a)(2). The PSLRA also requires courts to include findings regarding compliance with Rule 11 and issue sanctions for any violation. 15 U.S.C. § 77z-1(c). Importantly, the PSLRA requires that in any 33 Act case, "all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss." 15 U.S.C. § 77z-1(b). Many of the provisions apply only to actions brought "pursuant to the Federal Rules of Civil Procedure," i.e., brought in federal court. 15 U.S.C. § 77z-1(a). Although the discovery

stay does not have this express limitation, state courts usually do not stay discovery.[19] This is particularly important because the costs of discovery mount quickly and could cause defendants to settle unmeritorious actions rather than incur those costs, potentially resulting in the very *in terrorem* settlements that the PSLRA was designed to avoid. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313. (2007) (recognizing that Congress passed the PSLRA "[a]s a check against abusive litigation by private parties"). Filing in state court can also allow a plaintiff to avoid consolidation with federal actions asserting the same claims, leading to identical cases proceeding simultaneously in federal and state court.

Indeed, securities actions in state court have quite different outcomes than those in federal court. For instance, state courts dismiss 33 Act cases far less frequently than federal courts. Federal courts between 2011 and 2015 dismissed 29% of cases filed with only 33 Act claims.[20] However, from 2011 to 2015, of the 25 such cases filed in California state courts, only two have been involuntarily dismissed.[21]

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[19] *See* Douglas H. Flaum, et al., *Why Section 11 Class Actions Are Proliferating in California*, LAW360, April 27, 2015; *see also* Priya Cherian Huskins, *IPO Companies, Section 11 Suits and California State Court*, WOODRUFF SAWYER & CO., April 26, 2016, https://wsandco.com/do-notebook/ipo-companies-section-11-suits-california-state-court/.

[20] *See* Appendix A. Fifty-one cases were filed in federal court between 2011 and 2015. Ten of these were remanded to state court. Of the 41 cases that remained in federal court 12 were involuntarily dismissed.

[21] *See* Appendix B.

Filing 33 Act cases in state court may also lead to higher settlement amounts. Between 1996 and 2015, cases with only 33 Act claims had a median settlement amount of $4 million.[22] The median settlement amount for such cases filed in California state court since 2011 was $8 million.[23] Thus, the split among district courts regarding the meaning of SLUSA's jurisdictional amendments has a very real effect on the resolution of these cases.

Plaintiffs' counsel are clearly aware of these differences in federal and state court procedures and outcomes. As described above, more and more cases are being filed in state court, particularly in California. Plaintiffs are filing cases in California state court even where the Company is headquartered in another state, often based on the California residence of a single outside director.[24] This is a direct response to the favorable rulings in federal district courts of California remanding these cases when they are removed. As two attorneys for the plaintiffs' bar acknowledged, "the absence of any Court of Appeals or Supreme Court authority will allow plaintiffs to continue filing these actions, primarily in California state courts, while avoiding

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[22] Cornerstone Research, *Securities Class Action Settlements 2015 Review and Analysis* (2015). This median settlement amount includes state court cases.

[23] *See* Huskins, *supra* note 19.

[24] *See, e.g., Cervantes v. Dickerson*, Case No. 534768 (San Mateo Sup. Ct. filed July 21, 2015) (one outside director alleged to be citizen of California while the company and the individual defendants were citizens of New York).

jurisdictions that lack clear guidance."[25] *Amici* urge this Court to hear this case and provide the clear guidance needed for a uniform application of SLUSA and the federal securities laws.

III. A UNIFORM INTERPRETATION OF THE SECURITIES ACT, PSLRA, AND SLUSA IS NECESSARY FOR THE EFFICIENT AND CONSISTENT ADMINISTRATION OF JUSTICE.

The complexities of securities litigation make securities class actions well-suited for federal courts, and there is a national interest in consistent enforcement of the federal securities laws. This Court has recognized the important federal interest in regulating the integrity of the markets, stating "[t]he magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 78 (2006). To that end Congress passed the 33 Act and the Securities Exchange Act of 1934 ("34 Act"), which "have anchored federal regulation of vital elements of our economy." *Id.* In recent years this Court has granted certiorari repeatedly in cases concerning the construction of the federal securities laws.[26] *Amici*

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[25] Michael W. Stocker and Francis P. McConville, *Securities Act Cases Are Surging...in State Courts?*, LOS ANGELES DAILY JOURNAL, July 28, 2015.

[26] *See, e.g., Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008); *Jones v. Harris Assocs. L.P.*, 559 U.S. 335 (2010); *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 249-50 (2010); *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 36 (2011); *Janus Capital Grp., Inc. v. First*

(Footnote continued on following page)

urge this Court to grant certiorari and hold that the plain reading and legislative purpose of SLUSA requires all covered class actions bringing 33 Act claims to be filed in federal court. Only this conclusion accomplishes Congress's goal of ensuring the consistent application of the federal securities laws in federal court and preventing plaintiffs from avoiding the PSRLA by filing in state court. Conversely, concluding that state courts retain jurisdiction over federal claims would lead to the bizarre situation where class actions alleging *only* state claims or both state and federal claims *must* be removed to federal court, but those alleging only *federal* claims may remain in *state* court. *See Knox v. Agria Corp.*, 613 F. Supp. 2d 419, 425 (S.D.N.Y. 2009).

Congress's goal in passing SLUSA was to end the circumvention of the PSLRA's provisions by plaintiffs who were filing securities class actions in state court. Congress aimed to "correct the perceived failure of the PSLRA to curb abuses of federal securities fraud litigation" by enacting "national standards for securities class action lawsuits involving nationally traded securities." *See Knox*, 613 F. Supp. 2d at 421; Pub. L. No. 105–353, § 2(5), 112 Stat. 3227 (1998). Congress explicitly noted in SLUSA's preamble that after the PSLRA "a number of securities class action lawsuits have shifted from Federal to State courts . . . this shift has prevented [the PSLRA] from fully achieving its objectives . . . ."

Derivative Traders, 564 U.S. 135, 139 (2011); *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 807 (2011).

Thus, the purpose of SLUSA was to "***make[] Federal court the exclusive venue for most securities class action lawsuits***." H.R. Conf. Rep. No. 105-803, 2d Sess. (1998) at 13 (emphasis added). This purpose was noted by many members of Congress[27], the President[28], and even plaintiffs' attorneys.[29] Yet, district court rulings interpreting SLUSA's jurisdictional provisions to allow for state

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[27] For example, Representative Lofgren stated that SLUSA "will finally slam the door on strike suits by establishing Federal court as the exclusive venue for securities class actions." 144 Cong. Rec. E1383 (daily ed. July 21, 1998). Senator Kerry stated that SLUSA "mov[es] all class action securities lawsuits to federal court." 144 Cong. Rec. S4778-03, S4802 (1998). Senator Feinstein stated, "[S]uits traditionally filed in federal courts are now being placed in state courts" and SLUSA "will protect companies from this side-door tactic" by "establishing a uniform system for the movement of cases from state to federal court." *Id.* at S4797. Senator Grams said, "[T]his Act simply requires that class action lawsuits against nationally traded securities be filed in Federal court." *Id.* at S4802.

[28] In his SLUSA signing statement, President Clinton said: "[T]he uniform standards provided by this legislation state that class actions generally can be brought only in Federal court, where they will be governed by Federal law . . . ." Presidential Statement on Signing the Securities Litigation Uniform Standards Act of 1998, 34 WEEKLY COMP. PRES. DOC. 45, at 2248 (Nov. 3, 1998).

[29] A spokesman for the National Association of Securities and Commercial Law Attorneys testified in Congress that SLUSA "would eliminate even *Federal* cases from being heard in State courts," and the "States would be precluded from hearing actions under the 1933 Act . . . ." *Hearing Before the Subcomm. on Sec. of the Comm. on Banking, Hous., & Urban Affairs*, 105th Cong. 64 (Oct. 29, 1997) (prepared statement of Herbert E. Milstein).

court jurisdiction over class actions asserting only 33 Act claims directly frustrate this purpose.

SLUSA's jurisdictional provisions should be interpreted consistently with Congress's objective to establish federal courts as the exclusive forum for class actions regarding nationally traded securities. As this Court recently held in its review of the Affordable Care Act, where possible, courts should adopt the statutory reading that comports with the intent of the statute as a whole: "Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter." *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015). SLUSA's jurisdictional provisions comport with Congress's intent to make federal courts the exclusive jurisdiction for securities class actions, and that is the interpretation this Court should adopt.

Unless SLUSA is interpreted in this way, state court jurisdiction over securities class actions has and will continue to result in the 33 Act being applied inconsistently. State court decisions at the trial court level, unlike federal courts, rarely result in published—or even readily available unpublished—opinions. As this Court has noted, an important objective of the securities laws is "to maintain public confidence in the marketplace," which is achieved in part through private enforcement of the securities laws. *Dura*, 544 U.S. at 345. The lack of publicly available decisions hinders the uniform application of the securities

laws.[30] Further, state courts are not bound by federal court decisions, except for those of this Court.[31] Thus, each state will be a circuit unto itself, leading to a patchwork of legal standards for nationally traded securities.[32] This was not Congress's intent in enacting SLUSA. Finally, federal courts have addressed the issues presented in securities class actions since the 33 Act's enactment, whereas most state courts have little or no familiarity with the federal securities laws. This lack of familiarity with the issues manifests itself in a mosaic of inconsistent rulings.[33]

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[30] Hillel Y. Levin, *Making the Law: Unpublication in the District Courts*, 53 VILL. L. REV. 973, 989 (2008) ("[E]veryone who has empirically studied the issue has concluded that . . . the general unavailability of unpublished opinions potentially leads to a misconception of the law itself.").

[31] *See McLaughlin v. Walnut Props., Inc.*, 119 Cal. App. 4th 293, 297 (Cal. Ct. App. 2004) ("Since we are construing a federal statute, we must apply and interpret federal law. Decisions of the United States Supreme Court are binding. Lower federal court decisions, including those of the Ninth Circuit Court of Appeal, are not. If federal precedent is either lacking or in conflict, we will independently determine federal law.").

[32] *See Unschuld*, 2007 WL 2729011 at *8-9.

[33] *Compare, e.g., In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1406-07 (9th Cir. 1996) (holding that defendant company was not liable under Section 11 of the 33 Act for failing to disclose unknown plans of another company) *with Robinson v. Audience, Inc.*, No. 1:12-cv-232227, slip opinion (Santa Clara Sup. Ct. Sept. 3, 2013) (denying demurrer where complaint alleged defendant company failed to disclose customer's unknown plans).

This Court should grant *certiorari* to review this case and direct the lower courts to interpret SLUSA's jurisdictional provisions consistent with Congress's intent to make federal court the exclusive forum for securities class actions, thus ensuring the uniform application of the federal securities laws.

CONCLUSION

For these reasons, *amici* urge the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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JUNE 27, 2016

APPENDIX A — CASE OUTCOMES FOR FEDERAL CLASS ACTIONS FILED FROM 2011-2015; FILINGS WITH SECTION 11 CLAIMS AND NO RULE 10B-5 CLAIMS

FOLDOUT

			United Western Bancorp, Inc., et al		D. Colorado	Involuntary
3.	5/12/2011	11-CV-00520	Northumberland County Retirement System, et al. v. GMX Resources, Inc., et al.	10th	W.D. Oklahoma	Settled
4.	6/17/2011	11-CV-02919	Nancy Kowalski, et al. v. Apple REIT Ten, Inc., et al.	2nd	E.D. New York	Dismissed - Involuntary
5.	8/19/2011	11-CV-05831	Bhushan Athale, et al. v. SinoTech Energy Limited, et al.	2nd	S.D. New York	Settled
6.	10/25/2011	11-CV-81184	Martin J Fuller, et al. v. Imperial Holdings, Inc, et al.	11th	S.D. Florida	Settled
7.	10/28/2011	11-CV-01033	Karsten Schuh, et al. v. HCA Holdings, Inc., et al.	6th	M.D. Tennessee	Settled
8.	11/14/2011	11-CV-81270	Greenfield Childrens Partnership, et al. v. FriendFinder Networks, Inc., et al.	11th	S.D. Florida	Dismissed - Involuntary
9.	11/23/2011	11-CV-05669	Matthew Sandnas, et al. v. Pacific Biosciences of California, Inc., et al.	9th	N.D. California	Remanded to State Court
10.	11/28/2011	11-CV-08622	Barbara Blazer, et al. v. Apple REIT Nine, Inc., et al.	2nd	S.D. New York	Dismissed - Voluntary
11.	2/6/2012	12-CV-00373	Matthew A. Brady, et al. v. Kosmos Energy Ltd., et al.	5th	N.D. Texas	Settled
12.	5/23/2012	12-CV-04081	Brian Roffe Profit Sharing Plan, et al. v. Facebook, Inc., et al.	2nd	S.D. New York	Ongoing
13.	5/25/2012	12-CV-04191	David Schottenstein, et al. v. Credit Suisse AG, et al.	2nd	S.D. New York	Dismissed - Involuntary
14.	5/25/2012	12-CV-00054	Ming Yang, et al. v. Tibet Pharmaceuticals, Inc., et al.	3rd	D. Virgin Islands	Settled
15.	6/20/2012	12-CV-04839	Todd Augenbaum, et al. v. Lone Pine Resources, Inc., et al.	2nd	S.D. New York	Dismissed - Involuntary
16.	6/29/2012	12-CV-05124	George Scott, et al. v. Whitacre, et al.	2nd	S.D. New York	Dismissed - Involuntary
17.	7/20/2012	12-CV-02196	Chaz Campton, et al. v. Ignite Restaurant Group, Inc., et al.	5th	S.D. Texas	Settled
18.	8/16/2012	12-CV-04377	Olivia Niitsoo, et al. v. Alpha Natural Resources, Inc., et al.	4th	S.D. West Virginia	Remanded to State Court
19.	10/12/2012	12-CV-81123	Francis Howard, et al. v. Chanticleer Holdings, Inc., et al.	11th	S.D. Florida	Settled
20.	11/2/2012	12-CV-05636	Michael Toth, et al. v. Envivio, Inc., et al.	9th	N.D. California	Remanded to State Court
21.	11/21/2012	12-CV-08557	Shirley Horn, et al. v. Hi-Crush Partners LP, et al.	2nd	S.D. New York	Settled
22.	2/5/2013	13-CV-00842	Monroe County Employees' Retirement System, et al. v. YPF Sociedad Anonima, et al.	2nd	S.D. New York	Dismissed - Involuntary
23.	5/24/2013	13-CV-03935	Firefighters Pension & Relief Fund of the City of New Orleans, et al. v. T Paul Bulmahn, et al.	5th	E.D. Louisiana	Case Dismissed - Involuntary
24.	7/10/2013	13-CV-04790	David Adrian Luciano, et al. v. Linnco, LLC, et al.	2nd	S.D. New York	Case Dismissed - Involuntary

2.	[illegible]	[illegible]	United Western Bancorp, Inc., et al.	10th	D. Colorado	Involuntary
3.	5/12/2011	11-CV-00520	Northumberland County Retirement System, et al. v. GMX Resources, Inc., et al.	10th	W.D. Oklahoma	Settled
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7.	10/28/2011	11-CV-01033	Karsten Schuh, et al. v. HCA Holdings, Inc., et al.	6th	M.D. Tennessee	Settled
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12.	5/23/2012	12-CV-04081	Brian Roffe Profit Sharing Plan, et al. v. Facebook, Inc., et al.	2nd	S.D. New York	Ongoing
13.	5/25/2012	12-CV-04191	David Schottenstein, et al. v. Credit Suisse AG, et al.	2nd	S.D. New York	Dismissed - Involuntary
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20.	11/2/2012	12-CV-05636	Michael Toth, et al. v. Envivio, Inc., et al.	9th	N.D. California	Remanded to State Court
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22.	2/5/2013	13-CV-00842	Monroe County Employees' Retirement System, et al. v. YPF Sociedad Anonima, et al.	2nd	S.D. New York	Dismissed - Involuntary
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24.	7/10/2013	13-CV-04790	David Adrian Luciano, et al. v. Linnco, LLC, et al.	2nd	S.D. New York	Case Dismissed - Involuntary

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31.	5/19/2014	14-CV-03577	Waterford Township Police & Fire Retirement System, et al. v. Ply Gem Holdings, Inc., et al.	2nd	S.D. New York	Ongoing
32.	5/30/2014	14-CV-03876	Waterford Township Police & Fire Retirement System, et al. v. Regional Management Corp., et al.	2nd	S.D. New York	Ongoing
33.	5/30/2014	14-CV-03878	Karen J Desrocher, et al. v. Covisint Corporation, et al.	2nd	S.D. New York	Settled
34.	7/18/2014	14-CV-05450	Amar Singh, et al. v. Prosensa Holding N.V., et al.	2nd	S.D. New York	Dismissed - Involuntary
35.	8/6/2014	14-CV-06170	Thomas Welch, et al. v. Pacific Coast Oil Trust, et al.	9th	C.D. California	Remanded to State Court
36.	8/26/2014	14-CV-06942	Richard Steck, et al. v. Santander Consumer USA Holdings Inc., et al.	2nd	S.D. New York	Ongoing
37.	10/8/2014	14-CV-04516	Plymouth County Retirement System, et al. v. Model N, Inc., et al.	9th	N.D. California	Remanded to State Court
38.	10/27/2014	14-CV-00997	Michael Johnson, et al. v. CBD Energy Limited, et al.	5th	E.D. Texas	Ongoing
39.	12/24/2014	14-CV-08020	Wei Ding, et al. v. Roka Bioscience, Inc., et al.	3rd	D. New Jersey	Ongoing
40.	1/6/2015	15-CV-00602	Alexander Liu, et al. v. Xoom Corporation, et al.	9th	N.D. California	Remanded to State Court
41.	2/24/2015	15-CV-01337	Dekalb County Employees Retirement System, et al. v. Controladora Vuela Compañía de Aviacion, S.A.B. de C.V., et al.	2nd	S.D. New York	Ongoing
42.	4/30/2015	15-CV-03813	Firerock Global Opportunity Fund LP, et al. v. Rubicon Technology, Inc., et al.	7th	N.D. Illinois	Settled
43.	5/15/2015	15-CV-03773	Errol Rudman, et al. v. CHC Group Ltd., et al.	2nd	S.D. New York	Ongoing
44.	6/5/2015	15-CV-02512	City of Warren Police and Fire Retirement System, et al. v. Revance Therapeutics, Inc., et al.	9th	N.D. California	Remanded to State Court
45.	8/4/2015	15-CV-06126	Carl Stitt, et al. v. On Deck Capital, Inc., et al.	2nd	S.D. New York	Ongoing
46.	8/31/2015	15-CV-06880	Andrew D. Nguyen, et al. v. Maxpoint Interactive, Inc., et al.	2nd	S.D. New York	Ongoing
47.	10/5/2015	15-CV-13501	Anthony Fortunato, et al. v. Akebia Therapeutics, Inc., et al.	1st	D. Massachusetts	Remanded to State Court
48.	10/29/2015	15-CV-04981	Juan M. Rodriguez Beltran, et al. v. Terraform Global, Inc., et al.	9th	N.D. California	Ongoing
49.	11/13/2015	15-CV-08954	Enrico Vaccaro, et al. v. New Source Energy Partners L.P., et al.	2nd	S.D. New York	Ongoing
50.	12/7/2015	15-CV-14032	Heather Carlson, et al. v. Ovascience, Inc., et al.	1st	D. Massachusetts	Remanded to State Court
51.	12/9/2015	15-CV-00546	Marcia Goldberg, et al. v. Miller Energy Resources, Inc., et al.	6th	E.D. Tennessee	Ongoing

Appendix A

FOLDOUT

Dismissed – Voluntary	**3**	**7%**
Dismissed – Involuntary	**12**	**29%**
Settled	**13**	**32%**
Ongoing	13	32%
Total	41	100%

Source:
Stanford Law School Securities Class Action Clearinghouse

Note:
[1] Case status according to the Stanford Law School Securities Class Action Clearinghouse database as of June 23, 2016. Cases are identified by the Clearinghouse based on the claims made in first identified complaint.
[2] Other claims may or may not be present.

APPENDIX B — '33 ACT CLASS ACTIONS FILED IN CALIFORNIA STATE COURTS FROM 2011-2015

FOLDOUT

			514673	Voluntary
3.	Oct. 21, 2011	Young v. Pacific Biosciences of California, Inc.	San Mateo County CIV509210	Settled
4.	Mar. 13, 2012	Marcano v. Nye (Zeltiq Aesthetics, Inc.)	Alameda County RG12621290	Dismissed – Involuntary
5.	May 30, 2012	Lazar v. Facebook, Inc.	San Mateo County CIV514065, removed to federal court on June 21, 2012 N.D. Cal. 12-CV-03199 and transferred on Oct. 9, 2012 to S.D.N.Y 1:12-MD-02389-RWS	Removed to federal court and not remanded
6.	Aug. 1, 2012	Reyes v. Zynga Inc.	San Francisco County CGC-12-522876	Dismissed – Voluntary[3]
7.	Sept. 13, 2012	Robinson v. Audience, Inc.	Santa Clara County 1-12-CV-232227	Settled
8.	Oct. 19, 2012	Toth v. Envivio, Inc.	San Mateo County CIV517481, consolidated on Nov. 22 2013 San Mateo County CIV517185	Settled
9.	July 10, 2013	Desmarais v. Johnson (CafePress Inc.)	San Mateo County CIV522744	Settled
10.	Apr. 1, 2014	Beaver County Employees Retirement Fund v. Cyan, Inc.	San Francisco County CGC-14-538355	Ongoing
11.	Apr. 3, 2014	Rajasekaran v. CytRx Corp.	Los Angeles County BC541426	Ongoing[4]
12.	June 20, 2014	In re FireEye, Inc. Securities Litigation	Santa Clara County 1-14-CV-266866	Ongoing
13.	Sept. 5, 2014	Plymouth County Retirement System v. Model N, Inc.	San Mateo County CIV530291	Settled
14.	Oct. 16, 2014	Berliner v. Pacific Coast Oil Trust	Los Angeles County BC560944, consolidated on Nov. 18, 2014 Los Angeles County BC550418	Settled

[1] This case was voluntarily dismissed due to resolution of a related securities class action in federal court in the Central District of California, which was settled on May 23, 2013. Decl. in Support of Plaintiff (Req. for Dismissal), *West Virginia Laborers' Trust Fund v. STEC, Inc.*, Case No. 30-2011-00489022 (Orange County August 16, 2013).

[2] Plaintiffs voluntarily dismissed their claims after the final settlement of a related Section 11 case in federal court. Memorandum of Law in Support of Pl.'s Mot. for Voluntary Dismissal, Case No. CGC-11-514673 (San Francisco Cty. Super. Ct. Sept. 30, 2014).

[3] Plaintiff requested voluntary dismissal on the basis that Plaintiff no longer wished to participate in the suit individually, and purported class members were included within the class of a pending federal action. Pl.'s Unopposed Req. for Voluntary Dismissal of Action, *Reyes v. Zynga Inc.*, Case No. CGC-12-522876 (San Francisco Cty. Super. Ct. Feb. 4, 2015).

[4] This case was stayed pending resolution of a related federal action in which Plaintiff was an

FOLDOUT

18.	Apr. 2, 2015	Firefock Global Opportunity Fund LP v. Castlight Health, Inc.	San Mateo County CIV533203	Ongoing
19.	May 1, 2015	City of Warren Police and Fire Retirement System v. Revance Therapeutics, Inc.	San Mateo County CIV533635, transferred on Nov. 6, 2015 to Santa Clara County 15-CV-287794	Ongoing
20.	June 2, 2015	Hunter v. Aerohive Networks, Inc.	San Mateo County CIV534070	Settled
21.	July 21, 2015	Cervantes v. Dickerson (Etsy, Inc.)	San Mateo County CIV534768	Ongoing
22.	Aug. 11, 2015	Shen v. TrueCar, Inc.	Los Angeles County BC590999, removed on Aug. 8, 2015 to C.D. Cal. 2:15-CV-06270-R-PJW	Removed to federal court and not remanded[6]
23.	Aug. 24, 2015	Steinberg v. MobileIron, Inc.	Santa Clara County 1-15-CV-284761, consolidated on Jan. 4, 2016 Santa Clara County 1-15-CV-284001	Ongoing
24.	Oct. 5, 2015	Buelow v. Alibaba Group Holding Limited	San Mateo County CIV535692	Ongoing
25.	Oct. 23, 2015	Fraser v. Wuebbels (TerraForm Global, Inc.)	San Mateo County CIV535963, removed on Apr. 26, 2016 to N.D. Cal. 5:16-cv-02273	Removed to federal court and not remanded[7]
26.	Nov. 19, 2015	Kleiman v. Sientra, Inc.	San Mateo County CIV536313	Ongoing
27.	Dec. 1, 2015	Rezko v. XBiotech Inc.	Los Angeles County BC602793	Ongoing
28.	Dec. 7, 2015	Beaver County Employees Retirement Fund v. Avalanche Biotechnologies, Inc.	San Mateo County CIV536488	Ongoing

All Filings:

Status Summary	Counts	Percentage[5]
Dismissed – Voluntary	4	14%
Dismissed – Involuntary	2	7%
Settled	7	25%
Removed to Federal Court and Not Remanded	3	11%
Ongoing	12	43%
Total	28	100%

[5] Plaintiff sought voluntary dismissal in the interest of the class members, who Plaintiff believed to be adequately represented in a parallel suit. Memorandum of Law In Further Support of Request for Voluntary Dismissal, *Liu v. Xoom Corp.*, Case No. CGC-15-543531 (San Francisco Cty. Super. Ct. Dec. 15, 2015).

[6] This case was removed to federal court and plaintiff did not file a motion to remand. *See Ning Shen et al. v. TrueCar, Inc. et al.*, Case No. 2:15-cv-06270 (C.D. Cal. Aug. 18, 2015).

FOLDOUT

RECORD
AND
BRIEFS

No. 15-1439

IN THE

Supreme Court of the United States

CYAN, INC., et al.

PETITIONERS,

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, et al.,

RESPONDENTS.

On Petition For Writ Of Certiorari
To The Court Of Appeal Of The State Of California,
First Appellate District

BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND NATIONAL VENTURE CAPITAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association representing the interests of more than 650 securities firms, banks, and asset managers. SIFMA's mission is to support a strong financial industry while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. SIFMA works to represent its members' interests locally and globally. SIFMA has offices in New York and Washington, D.C. and is the U.S. regional member of the Global Financial Markets Association. SIFMA also has an office in London and its associated organization, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

Many of SIFMA's members serve as underwriters for, or otherwise participate in, securities offerings and, as such, they have a vital interest in the issues raised by this petition. SIFMA regularly files *amicus* briefs in cases with broad implications for financial markets, and frequently has appeared as *amicus curiae* in this Court. *See, e.g.*, *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318 (2015), *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058 (2014), *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1184 (2013), *Gabelli v. SEC*, 133 S. Ct. 2296 (2011), *Erica P. John Fund, Inc. v.*

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[1] Pursuant to this Court's Rule 37.2(a), counsel of record for all parties have received timely notice of the intent to file this brief. All parties consent to the filing of this *amici curiae* brief. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Halliburton Co., 131 S. Ct. 2179 (2011), and *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309 (2011).

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses, trade associations, and professional organizations of every size, in every sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, such as those involving federal securities laws, including *Omnicare, Amgen, Gabelli, Halliburton, Matrixx Initiatives, and Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011), among many others. Many of the Chamber's members are companies subject to federal securities laws that are directly and adversely affected by the California court's decision below.

The National Venture Capital Association ("NVCA") is the venture capital community's flagship trade association, serves as the definitive resource for venture capital data, and unites its member firms through a full range of professional services. NVCA's mission is to foster a greater understanding of the importance of venture capital to the U.S. economy, advocate for policies that strengthen the entrepreneurial ecosystem, and support innovation. Venture capitalists are committed to funding America's most cutting-edge entrepreneurs, working closely with them to transform breakthrough ideas into emerging growth companies that put innovation in the hands of the public and drive U.S. job creation and economic growth. In a recent study by Will

Gornall of the University of British Columbia and Ilya Strebulaev of Stanford University, the authors note that Apple, Google and Microsoft, three of the five largest U.S. public companies by market capitalization, all received most of their early, external funding from venture capital investors. Using public companies to measure the economic impact of venture-backed companies, the authors conclude that of the 1,339 companies that have gone public since 1974, 42% (556) can trace their roots to venture capital. Collectively, those 556 companies employ over three million workers and account for 85% of all research and development spending by companies that have gone public since 1974 and 63% of total market cap. NVCA's members make venture investments across all industry sectors and at various points in companies' life cycles. They have spawned new industries and led to pioneering and life-changing innovation in biotechnology, health care, software, semiconductors, telecommunications, computer science, and communications systems and devices—innovations that have enabled this nation to be the world's economic leader. Often, private venture capitalists invest in start-up companies with the expectation that, if the start-up is successful, they will be able to take the company public and earn a return on their investment. This common investment strategy, and consequently NVCA's members, would be directly and adversely affected if the Court were to uphold the California decision below because increased state court litigation of federal securities class actions has a potentially chilling effect on the willingness of the companies in which they invest to go public.

The issues raised by this petition are of vital importance to *amici* given the increase in state court securities class action lawsuits since the decision in *Luther v. Countrywide Financial Corp.*, 195 Cal. App. 4th 789 (2011)

("*Countrywide*"), and the adverse impact of increased state court litigation of '33 Act class actions on the competitiveness of the U.S. capital markets.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Almost twenty years after the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") was enacted, *Countrywide* and the decisions that have followed it have allowed class action plaintiffs' attorneys to shift federal securities class action lawsuits to California state courts *en masse*. And, through the use of non-appealable orders to remand federal class action complaints, the lower California federal courts have effectively turned that state into a safe haven for vexatious federal securities class action lawsuits. Left unchecked, the shift in federal securities litigation from federal to state courts could become a nationwide trend. This shift is exactly what Congress sought to prevent when it enacted SLUSA.

In the five years since the California Supreme Court's decision in *Countrywide*, thirty-eight class action lawsuits alleging claims under the Securities Act of 1933 ("'33 Act") have been filed in California state court. Twenty-six of these cases have been filed in either San Mateo or Santa Clara county state court, in the heart of California's Silicon Valley, and all of these cases have named underwriters as defendants. This exponential growth in litigation, and the fear of being haled into state court in California to defend protracted and expensive class action lawsuits, threatens to hinder technology start-ups and entrepreneurs in accessing the nation's capital markets in order to raise the cash they need to launch and grow their businesses.

The '33 Act imposes liability on issuers and underwriters (and certain individuals and companies who control them) for false and misleading statements in securities offering materials. Although the '33 Act has enhanced the integrity of the U.S. financial markets in certain respects, it also has created opportunities for abuse by class action plaintiffs' lawyers who bring costly strike suits seeking a quick settlement. Congress has sought to curb such abuse by enacting reforms, such as the Private Securities Litigation Reform Act (the "Reform Act"), that, among other things, limit where '33 Act class action lawsuits can be brought and who can bring them.

In particular, SLUSA sought, among other things, to eliminate state court concurrent jurisdiction over covered class actions alleging '33 Act claims. Notwithstanding SLUSA's clear statutory direction, California state courts have held that they still have concurrent jurisdiction over '33 Act claims. As a result, California state courts have become a magnet for '33 Act class actions, and some lower federal courts have followed California's lead.

If left unchecked, the proliferation of '33 Act class actions in state courts will have severe negative consequences for the nation's capital markets. Decisions like *Countrywide* and the rulings below sow uncertainty among issuers and underwriters concerning how the law that governs their conduct will be construed and applied. Increased uncertainty increases the risk to issuers and underwriters of raising capital in the United States, and this increased risk is ultimately passed on to investors in myriad ways. Among other things, enhanced litigation risk artificially depresses capital raising and entrepreneurship, and causes businesses to be wary of going public in the United States, thereby diminishing the strength and

reputation of U.S. capital markets. Ultimately, investors pay for the costs of litigation through a lower return on their investments.

Opportunities for meaningful federal judicial review of this important federal question are limited. Federal appellate courts have been unable to review lower court decisions because orders granting remand are non-reviewable under 28 U.S.C. § 1447(d) and orders denying remand are reviewable only after final judgment or approval of interlocutory appeal under 28 U.S.C. § 1292(b), both of which are rare occurrences.

This Court has a rare opportunity now to resolve this uncertainty. This case squarely presents the question of whether state courts possess jurisdiction over '33 Act covered class actions, or instead whether federal courts have exclusive jurisdiction over such actions. That question is purely legal, fully dispositive, and ripe for review by this Court. There is no telling if and when another vehicle for review will come before this Court. The Court should grant certiorari to decide this important federal question now.

Certiorari is also warranted because the decision below conflicts with SLUSA's plain language and purpose. The decision below—like the decision in *Countrywide*—incorrectly reads SLUSA's jurisdictional amendment in a way that renders it superfluous, which is contrary to well-established canons of statutory construction. The decision below also conflicts with Congress's acknowledged intent behind SLUSA—to make "Federal court the exclusive venue for most securities class action lawsuits," H.R. Conf. Rep. No. 105-803, at 13 (1998). This Court should grant certiorari to reverse the decision below and give proper effect to SLUSA's language and intended purpose.

ARGUMENT

I. THE DECISION BELOW IMPINGES ON IMPORTANT FEDERAL INTERESTS IN THE PROPER FUNCTIONING OF THE U.S. SECURITIES MARKETS.

When the California Court of Appeals decided *Countrywide* five years ago, commentators predicted that it would transform the California court system into a haven for federal securities class action plaintiffs. *See* Kevin M. Lacroix, *So, There's Concurrent State Court Jurisdiction for '33 Act Suits, Right? Well...*, THE D&O DIARY (May 20, 2011), http://www.dandodiary.com/2011/05/articles/securities-litigation/so-theres-concurrent-state-court-jurisdiction-for-33-act-suits-right-well. These predictions have come to pass. In the five years since *Countrywide*, 38 class actions under the '33 Act have been filed in California state courts, almost all of which have named underwriters as defendants. By contrast, in the 12 years after SLUSA but before *Countrywide*, only six class actions under the '33 Act were filed in California state courts.

This trend shows no sign of slowing. Commentators have noted that the recent spike in '33 Act cases in California state courts is because "plaintiffs appear to be aware of and specifically taking advantage of the *Countrywide* decision." *See* Douglas Flaum, Edward Han & Rachana Fischer, *Why Section 11 Class Actions Are Proliferating in Calif.*, LAW360 (Apr. 27, 2015), http://www.law360.com/articles/647708/why-section-11-class-actions-are-proliferating-in-calif. Without the Court's intervention, this trend may well emerge in state courts outside of California.

Permitting class action plaintiffs' lawyers to target California and other states as safe havens for vexatious federal securities litigation undermines the strong federal interest, embodied in SLUSA, in maintaining uniformity and integrity in the interpretation and application of the federal securities laws. As this Court has recognized, "[t]he magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 78 (2006). That is particularly true here. The U.S. securities industry employs over 900,000 people, with that number expected to grow 12% by 2018. *See* SelectUSA, *Financial Services Spotlight*, https://www.selectusa.gov/financial-services-industry-united-states. It raised $2.2 trillion of corporate capital for U.S. businesses in 2014, of which $2.1 trillion came from public debt and equity underwriting—the kind that often attracts '33 Act class actions. *See* SIFMA, *2015 Fact Book*, http://www.sifma.org/factbook/. And, as a percentage of GDP, it contributes more than the entire U.S. agriculture, forestry, fishing, and hunting industry. *See* U.S. Dep't of Commerce, Bureau of Econ. Analysis, *Industry Data*, http://www.bea.gov/iTable/index_industry_gdpIndy.cfm. These figures underscore the important national interest in protecting the securities industry from the uncertainty created by state court concurrent jurisdiction over '33 Act class actions.

If left unchecked, the effect of *Countrywide* will exact a heavy toll on the U.S. capital markets. *Countrywide* already has caused uncertainty among market participants regarding which jurisdiction, state or federal, has authority to create precedent for and govern market conduct in accordance with the '33 Act. This uncertainty directly affects those market participants that are frequently named as defendants in '33

Act cases, especially issuers and underwriters, and drives up the cost of raising capital in the United States. "One of the most dominant criticisms of U.S. capital markets is that the heavily litigious environment imposes significant costs disproportionate to its benefits." Michael R. Bloomberg & Charles E. Schumer, *Sustaining New York's and US' Global Financial Services Leadership* 29 (Jan. 22, 2007). Corporate executives have specifically cited the lack of predictability that arises from the overlapping roles of state and federal courts as a "major reason" why corporations increasingly choose to do business outside the United States. *Id.* at 77; *see also* H.R. Rep. No. 104-50, at 20 (1995) ("Fear of [securities] litigation keeps companies out of the capital markets."); Commission on the Regulation of U.S. Capital Markets in the 21st Century, *Report and Recommendations* 30 (2007) ("[I]nternal observers increasingly cite the U.S. legal and regulatory environment as a critical factor discouraging companies and other market participants from accessing U.S. markets."). As Congress has recognized, the risk of vexatious litigation dampens the ability to raise capital, especially for new and innovative businesses and technologies, and artificially limits access to U.S. capital markets. *See* H.R. Rep. No. 104-50, at 19-20.

These concerns are not merely theoretical. Although around 32% of class action securities complaints are dismissed in federal court, Priya Cherian Huskins et al., *Guest Post: IPO Companies, Section 11 Suits, and California State Court*, THE D&O DIARY (Apr. 28, 2016), http://www.dandodiary.com/2016/04/articles/securities-litigation/guest-post-ipo-companies-section-11-suits-and-california-state-court/, only around 5% (two out of thirty-eight) of the '33 Act class action complaints filed in California state court since *Countrywide* have been involuntarily dismissed. And even companies outside of

California are being targeted in such suits: "For example, Alibaba (a China-based company) and King Digital (an Irish Company) both have Section 11 suits pending in California state courts." *Id.*

Discovery—the main driver of litigation expense in securities class actions—occurs more easily and readily in '33 Act cases filed in state courts. In contrast to federal courts, it is not necessarily the case that the Reform Act's automatic stay of discovery, limitations on recovery of attorney's fees and expenses, and criteria governing selection of lead plaintiffs and their counsel apply in state court. *Compare* 15 U.S.C. § 77z-1 (setting forth federal court protections created by the Reform Act), *with Diamond Multimedia Sys., Inc. v. Superior Court*, 19 Cal. 4th 1036, 1070 (1999) ("Under California law, nothing comparable to the provisions of the Reform Act—intended both to make abusive securities strike litigation more difficult to mount and sustain, and to further the declared congressional policy of a national securities market—would apply to class action securities fraud suits filed in our courts."). Likewise, it is not clear that heightened federal pleading standards apply in state court. *See Omnicare*, 135 S. Ct. at 1332 (holding that federal pleading standard of *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), applies to '33 Act claims brought in federal court and that meeting it "is no small task for an investor"). Congress passed SLUSA to prevent plaintiffs from "circumvent[ing] the [the Reform Act's] provisions by ... filing frivolous and speculative lawsuits in State court, where essentially none of the [statute's] procedural or substantive protections against abusive suits are available." H.R. Conf. Rep. No. 105-803, at 14-15 (1998). Knowing all this, class action plaintiffs' attorneys continue to corral cases into state court, in direct contravention of SLUSA and other reforms.

Moreover, *Countywide* fosters wasteful, duplicative litigation. Only in federal court can multiple and overlapping securities actions be consolidated before a single judge for coordinated handling, thereby preventing duplicative discovery and inconsistent rulings on legal and factual issues. Under the rule dictated by *Countrywide* and the decision below, however, nothing stops plaintiffs from prosecuting parallel class actions in state and federal court. Companies, their directors, and securities industry participants are forced to defend sprawling federal securities litigation in state court—under one set of pleading, discovery, and class administration rules—and in federal court—under another. Underwriters, in turn, are forced to pass this extra expense on to the marketplace. Permitting competing state court litigation makes access to the U.S. capital markets more expensive as investors bear higher costs to compensate for soaring expenses.

II. THIS CASE IS A GOOD VEHICLE FOR RESOLVING THIS IMPORTANT ISSUE NOW.

This is exactly the sort of nationwide securities class action lawsuit for which Congress, through SLUSA, has established exclusive jurisdiction in the federal courts. This action arises from an IPO that was registered with the U.S. Securities and Exchange Commission and traded on the New York Stock Exchange. All claims are based solely on federal law; the Complaint alleges no claims based on state law. This case therefore squarely presents the question whether state courts possess jurisdiction over '33 Act covered class actions, or instead whether federal courts have exclusive jurisdiction over such actions. The issue on appeal is a pure question of law and is the dispositive issue in the case.

No better vehicle for resolving the issue is likely to materialize. Although the Court typically prefers to let

issues percolate through the federal courts of appeals, see *Arizona v. Evans*, 514 U.S. 1, 24 (1995) (Ginsburg, J., dissenting), that is unlikely to happen here. Indeed, the question presented here has never been addressed by a federal circuit court, despite dozens of federal district court decisions that have addressed this question in the 18 years since SLUSA's enactment. That is because a district court's decision to grant a motion to remand on account of the concurrent jurisdiction issue "is not reviewable on appeal or otherwise" under 28 U.S.C. § 1447(d). As this Court has held, with the exception of the limited categories of cases specifically carved out in the text of § 1447(d),[2] that statute's prohibition on review of remand orders is absolute and "review is unavailable no matter how plain the legal error in ordering the remand." *Kircher v. Putnam Funds Tr.*, 547 U.S. 633, 640-42 (2006); *see also Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224, 237 (2007) (refusing to create a judicial exception allowing appellate review of district court orders under the Foreign Sovereign Immunities Act). On the flip side of the coin, a district court's decision to deny a motion to remand would be reviewable only after final judgment or upon approval of interlocutory appeal under 28 U.S.C. § 1292(b). But due to the enormous costs of litigating and potentially losing a securities class action lawsuit, such cases rarely proceed to a final judgment. *See* Cornerstone Research, *Securities Class Action Filings 2014 Year in Review* 12 (2015), https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2014-Year-in-Review.pdf (showing

[2] *See* § 1447(d) (permitting appellate review of remand orders in cases removed pursuant to 28 U.S.C. § 1442, which deals with cases involving federal officers and agents, and 28 U.S.C. § 1443, which deals with civil rights cases).

that the vast majority of securities class actions end in dismissal or settlement, with only a few proceeding to verdict). And interlocutory appeal under § 1292(b) is typically reserved for "exceptional" cases. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74 (1996).

The absence of federal appellate review has created a vacuum that expands with each unreviewed lower court decision. Where a given '33 Act class action will be adjudicated, and under what standards, is increasingly unpredictable, with the result being driven by "the district in which the case happens to be heard, or even the judge within the district that the parties happen to draw." Mitchell A. Lowenthal & Shiwon Choe, *State Courts Lack Jurisdiction to Hear Securities Class Actions, But the Frequent Failure to Ask the Right Question Too Often Produces the Wrong Answer*, 17 U. PENN. J. BUS. L. 739, 743 (2015). If left to stand, the decision below will only strengthen the view that it is too costly and unpredictable to do business in the United States, driving away companies wishing to list their securities on U.S. exchanges. Simply put, unless and until this Court provides the necessary guidance, courts and litigants will continue to face even more confusion and disarray over the appropriate forum for class actions asserting only '33 Act claims.

III. THE DECISION BELOW CONFLICTS WITH THE LANGUAGE AND INTENT OF SLUSA.

Certiorari is also warranted because the decision below—and the decision in *Countrywide*—rest on fundamental errors of federal law. The California lower court decisions are contrary to the canon of statutory construction requiring that "legislative enactments should not be construed to render their provisions mere surplusage." *Dunn v. CFTC*, 519 U.S. 465, 472 (1997); *see also Corley v.*

United States, 556 U.S. 303, 314 (2009) (holding that "one of the most basic interpretative canons" is that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant" (internal quotations and citations omitted)).

SLUSA's jurisdictional amendment provides that state courts have concurrent jurisdiction over actions alleging '33 Act claims "except as provided in [Section 16] with respect to covered class actions." 15 U.S.C. § 77v(a). The California lower court decisions read the jurisdictional amendment's insertion of "except as provided in [Section 16] of this title with respect to covered class actions" to mean that only state law claims precluded by Section 16(b) and removable under Section 16(c) are no longer subject to state court concurrent jurisdiction. But this interpretation renders the jurisdictional amendment superfluous because Section 16(b) and Section 16(c) already have that effect. Construing the provision as the lower courts did ignores the language of the jurisdictional amendment, which provides that, "with respect to covered class actions," jurisdiction over '33 Act claims should not be concurrent.

Reading the statute to eliminate concurrent state court jurisdiction over '33 Act claims is consistent not only with rules of statutory construction, but also with Congress's purpose as reflected in SLUSA itself. *See Stone v. I.N.S.*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."). Congress enacted SLUSA after evidence emerged that the procedural protections of the Reform Act were causing plaintiffs to flock to state courts to pursue class action claims. While the Reform Act "sought to prevent abuses in private securities fraud lawsuits," "since

enactment of that legislation, considerable evidence has been presented to Congress that a number of securities class action lawsuits have shifted from Federal to State courts." SLUSA, Pub. L. 105-353, 112 Stat. 3227, § 2(1)-(2). Further legislation was required to allow the Reform Act to "fully achiev[e] its objectives." *Id.* § 2(3). Accordingly, SLUSA was enacted to make "Federal court the exclusive venue for most securities class action lawsuits," H.R. Conf. Rep. No. 105-803, at 13, under both the '33 and '34 Acts. Allowing securities class actions alleging exclusively federal securities claims to proceed in state court is an incongruous result that turns SLUSA on its head. There can be no rationale for such a result, and Congress certainly did not intend it.

CONCLUSION

The Court should grant the petition for writ of certiorari and reverse the judgment below.

Respectfully submitted,

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June 2016

RECORD
AND
BRIEFS

No. 15-1439

IN THE
Supreme Court of the United States

CYAN, INC., *et al.*,

Petitioners,

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, *et al.*,

Respondents.

On Writ of Certiorari to the
Court of Appeal of the State of California,
First Appellate District

JOINT APPENDIX

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California Court of Appeal's Order Denying the Petition for Writ of Mandate, Prohibition, or Other Relief (Dec. 10, 2015) 15a

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THE SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

Case No. CGC14538355

BEAVER COUNTY EMPLOYEES RETIREMENT FUND et al.,

Plaintiffs,

vs.

CYAN, INC. et al.,

Defendants.

Cause of Action:
SECURITIES/INVESTMENT

DOCKET ENTRIES (REGISTER OF ACTIONS)

Date	Proceedings
2014-04-01	SECURITIES/INVESTMENT, COMPLAINT FILED BY PLAINTIFF BEAVER COUNTY EMPLOYEES RETIREMENT FUND, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED RETIREMENT BOARD OF ALLEGHENY COUNTY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED DELAWARE COUNTY EMPLOYEES RETIREMENT SYSTEM, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED AS TO DE-

Date	Proceedings
	FENDANT CYAN, INC. FLOYD, MARK A. ZELLNER, MICHAEL W. HATFIELD, MICHAEL L. FERRIS, PAUL A. HAQUE, PROMOD RANSOM, M. NIEL BOUSTRIDGE, MICHAEL J. SWITZ, ROBERT E. GOLDMAN, SACHS & CO. J.P. MORGAN SECURITIES LLC JEFFERIES LLC PACIFIC CREST SECURITIES LLC DOES 1 TO 25, INCLUSIVE SUMMONS ISSUED, JUDICIAL COUNCIL CIVIL CASE COVER SHEET FILED CASE MANAGEMENT CONFERENCE SCHEDULED FOR SEP-03-2014 PROOF OF SERVICE DUE ON JUN-02-2014 CASE MANAGEMENT STATEMENT DUE ON AUG-11-2014 COMPLEX LITIGATION ASSIGNMENT REQUESTED BY FILING PARTIES; FEE INCLUDED IN FILING FEE
	* * *
2014-06-04	ORDER TO CONSOLIDATE ACTIONS OF CASE(S) CGC-14-539008 WITH CASE CGC-14-538355 – STIPULATION AND ORDER CONSOLIDATING CASES, APPOINTING LEAD COUNSEL AND SETTING A DATE FOR THE FILING OF A CONSOLIDATED AMENDED COMPLAINT

Date	Proceedings
2014-06-13	1ST AMENDED COMPLAINT (TRANSACTION ID # 55594090) FILED BY PLAINTIFF BEAVER COUNTY EMPLOYEES RETIREMENT FUND, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED RETIREMENT BOARD OF ALLEGHENY COUNTY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED DELAWARE COUNTY EMPLOYEES RETIREMENT SYSTEM, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED FLEISCHER, JENNIFER INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED AS TO DEFENDANT CYAN, INC. FLOYD, MARK A. ZELLNER, MICHAEL W. HATFIELD, MICHAEL L. FERRIS, PAUL A. HAQUE, PROMOD RANSOM, M. NIEL BOUSTRIDGE, MICHAEL J. SWITZ, ROBERT E. GOLDMAN, SACHS & CO. J.P. MORGAN SECURITIES LLC JEFFERIES LLC PACIFIC CREST SECURITIES LLC DOES 1 TO 25, INCLUSIVE

* * *

Date	Proceedings
2014-07-22	DEMURRER TO 1ST AMENDED COMPLAINT (TRANSACTION ID # 55768808) FILED BY DEFENDANT CYAN, INC. FLOYD, MARK A. ZELLNER, MICHAEL W. HATFIELD, MICHAEL L. FERRIS, PAUL A. HAQUE, PROMOD RANSOM, M. NIEL BOUSTRIDGE, MICHAEL J. SWITZ, ROBERT E. HEARING SET FOR OCT-17-2014 AT 01:30 PM IN DEPT 305
2014-07-22	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CY-AN DEFENDANTS DEMURRER TO CONSOLIDATED COMPLAINT (TRANSACTION ID # 55768808) FILED BY DEFENDANT CYAN, INC. FLOYD, MARK A. HATFIELD, MI-CHAEL L. FERRIS, PAUL A. BOUSTRIDGE, MICHAEL J.
2014-07-22	REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF CYAN DEFEND-ANTS DEMURRER TO CONSOLI-DATED COMPLAINT (TRANSAC-TION ID # 55768808) FILED BY DE-FENDANT CYAN, INC. FLOYD, MARK A. FERRIS, PAUL A. HAQUE, PROMOD BOUSTRIDGE, MICHAEL J.
2014-07-22	DECLARATION OF CHERYL W. FOUNG IN SUPPORT OF DEMUR-RER AND DEMURRER OF CYAN

Date	Proceedings
	DEFENDANTS TO CONSOLIDATED COMPLAINT WITH EXHIBITS A - G (TRANSACTION ID # 55768808) FILED BY DEFENDANT CYAN, INC. FLOYD, MARK A. FERRIS, PAUL A. HAQUE, PROMOD BOUSTRIDGE, MICHAEL J.
	* * *
2014-08-29	OPPOSITION TO DEFENDANTS DEMURRERS TO CONSOLIDATED COMPLAINT (TRANSACTION ID # 55960541) FILED BY PLAINTIFF BEAVER COUNTY EMPLOYEES RETIREMENT FUND, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED
2014-09-24	REPLY IN SUPPORT OF CYAN DEFENDANTS DEMURRER TO CONSOLIDATED COMPLAINT (TRANSACTION ID # 56082998) FILED BY DEFENDANT CYAN, INC. FLOYD, MARK A. ZELLNER, MICHAEL W. HATFIELD, MICHAEL L. FERRIS, PAUL A. HAQUE, PROMOD RANSOM, M. NIEL BOUSTRIDGE, MICHAEL J. SWITZ, ROBERT E.
	* * *
2014-10-22	ORDER OVERRULING CYAN DEFENDANTS' DEMURRER TO CONSOLIDATED COMPLAINT (TRANSACTION ID # 56235224)

Date	Proceedings
	* * *
2014-11-24	ANSWER TO 1ST AMENDED COMPLAINT (TRANSACTION ID # 56383108) FILED BY DEFENDANT CYAN, INC. FLOYD, MARK A. ZELLNER, MICHAEL W. HATFIELD, MICHAEL L. FERRIS, PAUL A. HAQUE, PROMOD RANSOM, M. NIEL BOUSTRIDGE, MICHAEL J. SWITZ, ROBERT E.
	* * *
2015-01-28	FEE PAID ON PLAINTIFFS NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION (NO ADVANCE HEARING DATE REQUIRED PER JUDGE KARNOW) (TRANSACTION ID # 56680717) FILED BY PLAINTIFF BEAVER COUNTY EMPLOYEES RETIREMENT FUND, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED RETIREMENT BOARD OF ALLEGHENY COUNTY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED DELAWARE COUNTY EMPLOYEES RETIREMENT SYSTEM, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED FLEISCHER, JENNIFER INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

Date	Proceedings
2015-01-28	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS MOTION FOR CLASS CERTIFICATION (TRANSACTION ID # 56680717) FILED BY PLAINTIFF BEAVER COUNTY EMPLOYEES RETIREMENT FUND, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED RETIREMENT BOARD OF ALLEGHENY COUNTY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED DELAWARE COUNTY EMPLOYEES RETIREMENT SYSTEM, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED FLEISCHER, JENNIFER INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED
	* * *
2015-02-03	STATEMENT OF NON-OPPOSITION TO PLAINTIFFS MOTION FOR CLASS CERTIFICATION (TRANSACTION ID # 56708882) FILED BY DEFENDANT CYAN, INC. FLOYD, MARK A. FERRIS, PAUL A. BOUSTRIDGE, MICHAEL J. GOLDMAN, SACHS & CO.
	* * *

Date	Proceedings
2015-04-07	SUPPLEMENTAL FILING IN SUPPORT OF CLASS CERTIFICATION (TRANSACTION ID # 57033380) FILED BY PLAINTIFF BEAVER COUNTY EMPLOYEES RETIREMENT FUND, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED RETIREMENT BOARD OF ALLEGHENY COUNTY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED DELAWARE COUNTY EMPLOYEES RETIREMENT SYSTEM, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED FLEISCHER, JENNIFER INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED
	* * *
2015-05-19	ORDER ON PLAINTIFFS' MOTION FOR CLASS CERTIFICATION (TRANSACTION 57266892)
2015-05-19	ORDER APPROVING FORM OF NOTICES OF PENDENCY OF CLASS ACTION (TRANSACTION 57266892)
	* * *
2015-08-25	NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS FOR LACK OF SUBJECT MATTER JURISDICTION (TRANS-

Date	Proceedings
	ACTION ID # 57766833) FILED BY DEFENDANT CYAN, INC. FLOYD, MARK A. ZELLNER, MICHAEL W. HATFIELD, MICHAEL L. FERRIS, PAUL A. HAQUE, PROMOD RANSOM, M. NIEL BOUSTRIDGE, MICHAEL J. SWITZ, ROBERT E. HEARING SET FOR OCT-09-2015 AT 09:00 AM IN DEPT 304
2015-08-25	MEMORANDUM OF POINTS AND AUTHORITIES (TRANSACTION ID # 57766833) FILED BY DEFENDANT CYAN, INC. FLOYD, MARK A. ZELLNER, MICHAEL W. HATFIELD, MICHAEL L. FERRIS, PAUL A. HAQUE, PROMOD RANSOM, M. NIEL BOUSTRIDGE, MICHAEL J. SWITZ, ROBERT E.
	* * *
2015-09-22	OPPOSITION TO CYAN DEFENDANTS MOTION FOR JUDGMENT ON THE PLEADINGS FOR LACK OF SUBJECT MATTER JURISDICTION (TRANSACTION ID # 57899940) FILED BY PLAINTIFF BEAVER COUNTY EMPLOYEES RETIREMENT FUND, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED RETIREMENT BOARD OF ALLEGHENY COUNTY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITU-

Date	Proceedings
	ATED DELAWARE COUNTY EMPLOYEES RETIREMENT SYSTEM, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED FLEISCHER, JENNIFER INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED
	* * *
2015-10-16	REPLY IN SUPPORT OF THEIR MOTION FOR JUDGMENT ON THE PLEADINGS FOR LACK OF SUBJECT MATTER JURISDICTION (TRANSACTION ID # 58030415) FILED BY DEFENDANT CYAN, INC. FLOYD, MARK A. ZELLNER, MICHAEL W. HATFIELD, MICHAEL L. FERRIS, PAUL A. HAQUE, PROMOD RANSOM, M. NIEL BOUSTRIDGE, MICHAEL J. SWITZ, ROBERT E.
	* * *
2015-10-23	MINUTES FOR OCT-23-2015 9:00 AM
2015-10-23	MOTION FOR JUDGMENT ON THE PLEADINGS AND CASE MANAGEMENT CONFERENCE ON OCT-23-2015. MOTION IS DENIED. MATTER IS SET FOR FURTHER CASE MANAGEMENT CONFERENCE ON NOV-10-2015 AT 2:00 PM IN 304. JUDGE CURTIS E.A. KARNOW, CLERK DANIAL LEMIRE, REPORTER SHEILA

Date	Proceedings
	PHAM CSR #13293.
	* * *
2015-10-23	ORDER DENYING DEFENDANTS MOTION FOR JUDGMENT ON THE PLEADINGS (TRANSACTION #58064025)
	* * * *

SUPERIOR COURT OF
THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

Lead Case No. CGC-14-538355
(Consolidated with No. CGC-14-539008)

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, et al., Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

CYAN, INC., et al.,

Defendants.

CLASS ACTION

CONSOLIDATED COMPLAINT FOR VIOLATIONS OF: (1) §11 OF THE SECURITIES ACT OF 1933; (2) §12(A)(2) OF THE SECURITIES ACT OF 1933; AND (3) §15 OF THE SECURITIES ACT OF 1933

DATE ACTION FILED: 04/01/14

DEMAND FOR JURY TRIAL

Plaintiffs Beaver County Employees Retirement Fund, Retirement Board of Allegheny County, Delaware County Employees Retirement System and Jennifer Fleischer ("Plaintiffs") individually and on behalf of all others similarly situated, allege the following based upon personal knowledge as to Plaintiffs and Plaintiffs' own acts, and upon information

and belief as to all other matters based on the investigation conducted by and through Plaintiffs' attorneys, which included, among other things, a review of Cyan, Inc.'s ("Cyan" or the "Company") press releases, Securities and Exchange Commission ("SEC") filings, analyst reports, media reports and other publicly disclosed reports and information about defendants. Plaintiffs believe that substantial evidentiary support will exist for the allegations set forth herein after a reasonable opportunity for discovery.

NATURE OF THE ACTION

1. This is a securities class action on behalf of all purchasers of the common stock of Cyan pursuant and/or traceable to the Registration Statement and Prospectus issued in connection with Cyan's May 9, 2013 initial public stock offering (the "IPO"), seeking to pursue strict liability remedies under the Securities Act of 1933 (the "1933 Act").

JURISDICTION AND VENUE

2. The claims alleged herein arise under §§11, 12(a)(2) and 15 of the 1933 Act, 15 U.S.C. §§77k, 771(a)(2) and 77o. Jurisdiction is conferred by §22 of the 1933 Act and venue is proper pursuant to §22 of the 1933 Act. Section 22 of the 1933 Act explicitly states that "[e]xcept as provided in section 16(c), no case arising under this title and brought in any State court of competent jurisdiction shall be removed to any court in the United States." Section 16(c) refers to "covered class actions," which are defined as lawsuits brought as class actions or brought on behalf of more than 50 persons asserting claims under state or common law. This is an action asserting federal law claims. Thus, it does not fall within the definition of a "covered class action" under § 16(b)-(c) and ***is***

therefore is not removable to federal court, under the Securities Litigation Uniform Standards Act of 1998 or otherwise. *See Luther v. Countrywide Fin. Corp.*, 195 Cal. App. 4th 789, 792 (2011) ("The federal Securities Act of 1933, as amended by the Securities Litigation Uniform Standards Act, provides for concurrent jurisdiction for cases asserting claims under the 1933 Act . . . .") (citations omitted); *Luther v. Countrywide Home Loans Servicing LP*, 533 F.3d 1031, 1032 (9th Cir. 2008) ("Section 22(a) of the Securities Act of 1933 creates concurrent jurisdiction in state and federal courts over claims arising under the Act. It also specifically provides that such claims brought in state court are not subject to removal to federal court.").

3. The violations of law complained of herein occurred in this State and in large part in this County, including the dissemination of the materially false and misleading statements complained of herein into this State and into this County. Each of the Underwriter Defendants (as defined below) has a sizable San Francisco office and maintains substantial and continuous contact with California by conducting significant investment banking operations in this County and throughout this State. Furthermore, the San Francisco office of Cooley LLP represented the Underwriter Defendants in the IPO and, therefore, significant drafting of the Registration Statement took place in San Francisco, as did efforts to organize and coordinate the road show to sell the IPO.

PARTIES

4. Plaintiffs Beaver County Employees Retirement Fund, Retirement Board of Allegheny County, Delaware County Employees Retirement System and Jennifer Fleischer purchased Cyan common stock

pursuant and/or traceable to the IPO, and were damaged thereby.

5. Defendant Cyan is a Petaluma, California-based telecommunications hardware and software company whose main products consist of optical networking hardware and related management software.

6. Defendant Mark A. Floyd ("Floyd") is, and was at the time of the IPO, Cyan's Chief Executive Officer ("CEO"), a director and Chairman of Cyan's Board of Directors.

7. Defendant Michael W. Zellner ("Zellner") was, at the time of the IPO, Cyan's Chief Financial Officer ("CFO").

8. Defendant Michael L. Hatfield ("Hatfield") is, and was at the time of the IPO, the President of Cyan and one of its directors.

9. Defendant Paul A. Ferris ("Ferris") is, and was at the time of the IPO, a Cyan director.

10. Defendant Promod Haque ("Haque") is, and was at the time of the IPO, a Cyan director.

11. Defendant M. Niel Ransom ("Ransom") is, and was at the time of the IPO, a Cyan director.

12. Defendant Michael J. Boustridge ("Boustridge") is, and was at the time of the IPO, a Cyan director.

13. Defendant Robert E. Switz ("Switz") is, and was at the time of the IPO, a Cyan director.

14. The defendants referenced above in ¶¶6-13 are referred to herein as the "Individual Defendants." The Individual Defendants each signed the Registration Statement. The defendants referenced above in ¶¶6-8 are, or were, executives of Cyan, participated

in the roadshow to sell the IPO and are sometimes referred to herein as the "Executive Defendants."

15. Defendant Goldman Sachs & Co. ("Goldman Sachs") is an American multinational investment banking firm that engages in global investment banking, securities, investment management, and other financial services primarily with institutional clients. Goldman Sachs acted as an underwriter and joint book-running manager of Cyan's IPO, helping to draft and disseminate the offering documents.

16. Defendant J.P. Morgan Securities LLC ("J.P. Morgan") is an investment banking and security brokerage service that also provides cash and wealth management, stock and options management, and education and retirement planning services. J.P. Morgan acted as an underwriter and joint book-running manager of Cyan's IPO, helping to draft and disseminate the offering documents.

17. Defendant Jefferies LLC ("Jefferies") is an American global investment banking and institutional securities firm. Jefferies acted as an underwriter of Cyan's IPO, helping to draft and disseminate the offering documents.

18. Defendant Pacific Crest Securities LLC ("Pacific Crest") is an investment banking firm that provides financial advisory services to public and privately held technology companies. Pacific Crest acted as an underwriter of Cyan's IPO, helping to draft and disseminate the offering documents.

19. The defendants named in ¶¶15-18 are referred to herein as the "Underwriter Defendants." Pursuant to the 1933 Act, the Underwriter Defendants are liable for the statements in the Registration Statement as follows:

(a) The Underwriter Defendants are investment banking houses which specialize, *inter alia*, in underwriting public offerings of securities. They served as the underwriters of the IPO and shared more than $7 million in fees collectively. The Underwriter Defendants determined that in return for their share of the IPO proceeds, they were willing to merchandize Cyan stock in the IPO. The Underwriter Defendants arranged a multi-city roadshow prior to the IPO during which they, and the Executive Defendants, met with potential investors and presented highly favorable information about the Company, its operations, and its financial prospects.

(b) Representatives of the Underwriter Defendants also assisted Cyan and the Individual Defendants in planning the IPO, and purportedly conducted an adequate and reasonable investigation into the business and operations of Cyan, an undertaking known as a "due diligence" investigation. The due diligence investigation was required of the Underwriter Defendants in order to engage in the IPO. During the course of their "due diligence," the Underwriter Defendants had continual access to confidential corporate information concerning Cyan's operations and financial prospects.

(c) In addition to availing themselves of virtually unbridled access to internal corporate documents, agents of the Underwriter Defendants, including their counsel at Cooley LLP, of San Francisco, California, met with Cyan's management and top executives and engaged in "drafting sessions" between at least December 2012 and May 2013. During these sessions, understandings were reached as to: (i) the strategy to best accomplish the IPO; (ii) the terms of the IPO, including the price at which Cyan

stock would be sold; (iii) the language to be used in the Registration Statement; (iv) what disclosures about Cyan would be made in the Registration Statement; and (v) what responses would be made to the SEC in connection with its review of the Registration Statement. As a result of those constant contacts and communications between the Underwriter Defendants' representatives in San Francisco, California and management and top executives, the Underwriter Defendants should have known of Cyan's existing problems as detailed herein.

(d) The Underwriter Defendants caused the Registration Statement to be filed with the SEC and declared effective in connection with offers and sales thereof, including to Plaintiffs and the Class.

20. The true names and capacities of defendants sued herein under California Code of Civil Procedure §474 as Does 1 through 25, inclusive, are presently not known to Plaintiffs, who therefore sue these defendants by such fictitious names. Plaintiffs will seek to amend this Complaint and include these Doe defendants' true names and capacities when they are ascertained. Each of the fictitiously named defendants is responsible in some manner for the conduct alleged herein and for the injuries suffered by Plaintiffs and the Class.

SUBSTANTIVE ALLEGATIONS

21. Defendant Cyan was founded in 2006. The Company supplies hardware modules and software that supports switching and packet transport support for internet networking services. Cyan's three primary product offerings include: (i) the Z-Series multi-layer packet-optical transport platforms released in 2009; (ii) the Cyan PRO comprehensive pro-

fessional services released in 2011; and (iii) the Blue Planet SDN software released in December 2012.

22. As of 2012, almost all of the Company's sales had been of its Z-Series product. The Blue Planet software line, which supported software defined networks, was yet untested and would only be released in December 2012. The Company's largest customer was Windstream Corporation ("Windstream"), who had been using Cyan's Z-Series platform. Windstream is a leading provider of advanced network communications, including cloud computing and managed services, to businesses nationwide. Windstream also offers broadband, phone and digital TV services to consumers primarily in rural areas. For the fiscal years ended December 31, 2011 and 2012, and the three months ended March 31, 2013, Windstream had accounted for approximately 37%, 45% and 47% of Cyan's revenue, respectively. All orders by Windstream were made pursuant to purchase orders and the Company had no long-term purchase commitment with Windstream. As 2012 drew to a close, Windstream announced it was cutting upwards of 400 management jobs and had publicly stated that it was cutting 2013 capital expenditures.

23. So, on the heels of just having very recently increased its annual sales exponentially – largely to Windstream – from $23.8 million in fiscal 2010 to $40.4 million in fiscal 2011 and to $95.872 million in fiscal 2012, and having only recently released its new commercially untested Blue Planet software offering in December 2012, on or about April 4, 2013, Cyan filed with the SEC its Registration Statement on Form S-1, which, following several subsequent filings and amendments in response to comments from the SEC in letters dated January 16, 2013, March 15,

2013 and April 17, 2013, would later be utilized for the IPO (the "Registration Statement"). On May 8, 2013, the SEC declared the Registration Statement effective. On or about May 9, 2013, Cyan and the Underwriter Defendants priced the IPO and filed the final Prospectus for the IPO, which forms part of the Registration Statement (collectively, the "Registration Statement").

24. The Registration Statement was negligently prepared and, as a result, contained untrue statements of material fact or omitted to state other facts necessary to make the statements made not misleading, and was not prepared in accordance with the rules and regulations governing its preparation.

25. The Registration Statement positively described the demand for Cyan's product offerings in the networking industry at the time of the IPO. The Registration Statement stated, in pertinent part, as follows:

> ***New applications and communications trends are driving tremendous growth in bandwidth demand, resulting in increased service requirements as well as dramatic shifts in overall network traffic patterns***. At the same time, competition from traditional vendors as well as new market entrants is limiting service providers' ability to sustain and grow revenue. ***As a result, service providers must upgrade their networks to handle the exponential scaling challenges driven by these trends as well as to profitably deliver the growing breadth of premium services demanded by their subscribers***. Other network operators are also facing these scalability requirements

while seeking to deliver new applications that improve the productivity and efficiency of their businesses. ***We designed our solutions to enable network operators to address these challenges while scaling their networks and services efficiently***.

26. The Registration Statement emphasized the Company's purportedly steadily growing revenues, right up through the IPO, stating, in pertinent part, as follows:

> Our revenue increased from $23.5 million in the year ended December 31, 2010 to $40.4 million in the year ended December 31, 2011, and to $95.9 million in the year ended December 31, 2012, ***and from $14.2 million in the three months ended March 31, 2012 to $26.3 million in the three months ended March 31, 2013***.
>
> * * *
>
> ***We believe that an improving economy, continued growth in bandwidth demand and increased acceptance of our software-defined networking technology and our high-capacity, multi-layer switching and transport platforms, as an alternative to router-based architecture, contributed to our revenue growth. To drive and support this growing demand and increase our revenue, we increased our sales and marketing headcount from March 31, 2012 to March 31, 2013***.
>
> * * *
>
> ***Quarterly Revenue Trends***

> . . . ***We generally expect an increase in business activity as we approach December,*** as some of our customers accelerate spending to use remaining capital budget dollars.

27. The statements referenced above in ¶¶25 and 26 were each materially false and misleading because they failed to disclose and misrepresented the following adverse facts that existed at the time of the IPO:

(a) that Windstream would dramatically reduce its purchases from Cyan due to the expected completion of Windstreams fiber-to-the-tower and broadband stimulus programs in the second half of 2013; and

(b) that Cyan was not successfully expanding and diversifying its customer base at the time of the IPO.

28. The Registration Statement stated that:

> Windstream has publicly indicated its intention to reduce its overall capital expenditures in 2013. Accordingly, we expect our sales to decline in future periods. Nonetheless, we anticipate that a large portion of our revenue will continue to depend on sales to Windstream.

This statement was misleading because it advised investors that sales to Windstream would continue to be a large portion of Cyan's revenues, when in fact the bulk of sales to Windstream were dependent on Windstream's participation in Verizon's fiber-to-the-tower project, and in the broadband stimulus initiative. With the expected completion of these projects in the immediate future, sales to Windstream would largely dry up.

29. The Registration Statement purported to warn about the risks associated with Windstream's announcement of capital expenditure reductions, stating in pertinent part as follows:

> ***We currently generate the majority of our revenue from a concentrated base of customers, including Windstream Corporation. Since Windstream has publicly indicated its intent to reduce its overall capital expenditures in 2013, unless we can substantially expand our sales to other existing or new customers, we will not be able to grow our revenue.***

This statement was inadequate to warn investors of the true risks associated with Cyan and its dependence on Windstream.

30. The Registration Statement purported to warn that "our largest customer, Windstream Corporation, has publicly indicated its intention to reduce its ***overall capital expenditures*** in 2013, and, as a result, our operating results ***may be harmed if we are unable to expand our sales*** to other existing or new customers." Yet, at the time of the IPO, the programs at Windstream supporting purchases from Cyan were already reaching their end and Cyan was already failing in its efforts to expand and diversify its customer base.

31. The Registration Statement purported to warn that Cyan "currently generate[d] the majority of [its] revenue from the sale of [its] Z-Series platforms, and a decrease in purchases of these platforms ***may adversely affect [the Company]***." Yet, at the time of the IPO, the programs at Windstream supporting purchases from Cyan were already reaching their

end and Cyan was already failing in its efforts to expand and diversify its customer base.

32. Similarly, the Company's statements that it then "expect[ed its] revenue derived from sales to Windstream to decline ***as a percentage of [its] revenue*** in future periods ***as [it] expand[ed its] customer base*** both in the United States and internationally" was false and misleading as it suggested Cyan was successfully expanding its customer base. Even the statement that Cyan expected "sales to Windstream to decline in future periods" failed to sufficiently inform investors because it omitted and concealed the magnitude of Cyan's dependence on Windstream's fiber-to-the-tower and broadband stimulus projects and the immediacy of the loss of demand for its products that Cyan was facing in the second half of 2013.

33. Under the rules and regulations governing the preparation of the Registration Statement, Cyan knew and defendants should have disclosed that the vast bulk of Cyan's sales to Windstream were dependent upon two discrete projects, Windstream's involvement in Verizon's fiber-to-the-tower project and Verizon's participation in the broadband stimulus project, both of which were expected to be completed in the second half of 2013, and would necessarily result in a substantial reduction of revenues that Cyan would receive from Windstream. The various tower build-out projects that Cyan participated in with Windstream involved a four-to-six-month planning cycle, so that Cyan had at minimum a four-to-six-month window for future Windstream revenues. Indeed, in April 2013, prior to the IPO, Windstream had already terminated many of the project planning engineers at Windstream because the fiber-

to-the-tower build-out was quickly reaching its completion.

34. Pursuant to Item 303 of Regulation S-K [17 C.F.R. §229.303], and the SEC's related interpretive releases thereto, issuers are required to disclose events or uncertainties that have caused or are reasonably likely to cause the registrant's financial information not to be indicative of future operating results, including any known trends. At the time of the IPO, unbeknownst to investors, most of the revenues that Cyan obtained from Windstream were the result of two projects that were expected to be completed in late 2013, Verizon's fiber-to-the-tower build-out and Verizon's participation in the broadband stimulus initiative, and that as a result, sales to Windstream were not simply expected to decline in future periods, but that the two projects driving the bulk of those sales would be completed in the immediate future. Cyan was unable to replace those sales, and Cyan was unable to expand or to diversify its customer base. The adverse events and uncertainties associated with these declining trends were reasonably likely to have a material impact on Cyan's profitability and, therefore, were required to be disclosed in the Registration Statement.

35. In 1989, the SEC issued an interpretive release on Item 303 and the disclosures required under the regulation. *See* "Management's Discussion and Analysis of Financial Condition and Results of Operations," SEC Release No. 33-6835, 1989 SEC LEXIS 1011 (May 18, 1989) (hereinafter referred to as the "1989 Interpretive Release"). In the 1989 Interpretive Release, the SEC stated that:

> Required disclosure is based on currently known trends, events and uncertainties that

> are reasonably expected to have material effects, such as: A reduction in the registrant's product prices; erosion in the registrant's market share; changes in insurance coverage; or the likely non-renewal of a material contract.
>
> * * *
>
> A disclosure duty exists where a trend, demand, commitment, event or uncertainty is both presently known to management and reasonably likely to have material effects on the registrant's financial condition or results of operation.

Id. at *12-*13.

36. Furthermore, the 1989 Interpretive Release provided the following test to determine if disclosure under Item 303(a) is required:

> Where a trend, demand, commitment, event or uncertainty is known, management must make two assessments:
>
> (1) Is the known trend, demand, commitment, event or uncertainty likely to come to fruition? If management determines that it is not reasonably likely to occur, no disclosure is required.
>
> (2) If management cannot make that determination, it must evaluate objectively the consequences of the known trend, demand, commitment, event or uncertainty, on the assumption that it will come to fruition. Disclosure is then required unless management determines that a material effect on the registrant's financial condition or results is not reasonably likely to occur.

Id. at *19.

37. The adverse events and uncertainties associated with the Company's loss of sales to Windstream, its inability to replace those sales, and its inability to expand or diversify its customer base would have a negative impact on the Company's continuing operations. Accordingly, the Registration Statement was required to disclose these facts, but did not. These known trends, events, or uncertainties that were reasonably likely to have a material adverse effect on Cyan's sales revenues and profits, and consequently, on the Company's future operating results and present stock value, were negligently omitted from the Registration Statement. Indeed, in the SEC's letters commenting on the registration statement and requesting additional information, the SEC had specifically asked Cyan to explain the reasons for the increase in shipments of the Z-series platform in 2012 and to explain whether the increase was related to a trend or known demands or was the result of isolated events, which Cyan failed to do.

38. The IPO was successful for the Company and the underwriters, who sold 8,899,022 million shares of Cyan common stock to the public at $11 per share, raising approximately $97.9 million in gross proceeds for the Company ($87.2 million in aggregate net proceeds from the IPO after deducting underwriting discount, commissions and offering costs).

39. Within six months after the IPO, however, Cyan's stock price collapsed. On October 30, 2013, the price of the Company's stock plummeted to $4.98. Although Cyan reported record revenues of $37.7 million for the third quarter of 2013, on October 29, 2013, those revenues were in large part due to an unusual $9.8 million lease arrangement with Wind-

stream. In addition, Cyan advised investors that it was expecting fourth quarter 2013 revenues to decline to between $30 to $33 million, rather than benefit from the typical year-end seasonal increase, and that fourth quarter revenues from Windstream (which accounted for 50% of third quarter 2013 revenues) would be substantially less than in prior quarters. In fact, Cyan failed to meet that reduced forecast. On February 11, 2014, Cyan announced fourth quarter 2013 total revenues of $20.9 million. Specifically with respect to Windstream, Cyan revealed that Windstream revenues had declined to $2.3 million in the fourth quarter of 2013. That trend continued in the first quarter of 2014. On May 6, 2014, Cyan announced total first quarter revenue of $19 million and that Windstream had accounted for less that 10% of that amount. The stock now trades at around $3.85 per share, 35% of the price the stock was offered at in the IPO.

CLASS ACTION ALLEGATIONS

40. Plaintiffs bring this action as a class action on behalf of a class consisting of all those who purchased Cyan common stock pursuant and/or traceable to the Registration Statement and Prospectus issued in connection with the IPO (the "Class"). Excluded from the Class are defendants and their families, the officers and directors and affiliates of defendants, at all relevant times, members of their immediate families and their legal representatives, heirs, successors or assigns and any entity in which defendants have or had a controlling interest.

41. The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to Plaintiffs at this time and can only be ascertained

through appropriate discovery, Plaintiffs believe that there are hundreds of members in the proposed Class. Record owners and other members of the Class may be identified from records maintained by Cyan or its transfer agent and may be notified of the pendency of this action by mail, using the form of notice similar to that customarily used in securities class actions.

42. Plaintiffs' claims are typical of the claims of the members of the Class as all members of the Class are similarly affected by defendants' wrongful conduct in violation of federal law that is complained of herein.

43. Plaintiffs will fairly and adequately protect the interests of the members of the Class and have retained counsel competent and experienced in class and securities litigation.

44. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among the questions of law and fact common to the Class are:

(a) whether defendants violated the 1933 Act;

(b) whether statements made by defendants to the investing public in the Registration Statement and Prospectus misrepresented material facts about the business and operations of Cyan; and

(c) to what extent the members of the Class have sustained damages and the proper measure of damages.

45. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impracti-

cable. Furthermore, as the damages suffered by individual Class members may be relatively small, the expense and burden of individual litigation make it impossible for members of the Class to individually redress the wrongs done to them. There will be no difficulty in the management of this action as a class action.

FIRST CAUSE OF ACTION

For Violations of §11 of the 1933 Act Against All Defendants

46. Plaintiffs incorporate ¶¶1-45 by reference.

47. This Count is brought pursuant to §11 of the 1933 Act, 15 U.S.C. §77k, on behalf of the Class, against all defendants.

48. The Registration Statement for the IPO was inaccurate and misleading, contained untrue statements of material facts, omitted to state other facts necessary to make the statements made not misleading, and omitted to state material facts required to be stated therein.

49. Defendants are strictly liable to Plaintiffs and the Class for the misstatements and omissions.

50. None of the defendants made a reasonable investigation or possessed reasonable grounds for the belief that the statements contained in the Registration Statement were true and without omissions of any material facts and were not misleading.

51. By reason of the conduct herein alleged, each defendant violated, and/or controlled a person who violated, §11 of the 1933 Act.

52. Plaintiffs acquired Cyan common stock traceable to the IPO.

53. Plaintiffs and the Class have sustained damages. The value of Cyan common stock has declined substantially subsequent to and due to defendants' violations.

54. At the time of their purchases of Cyan common stock, Plaintiffs and other members of the Class were without knowledge of the facts concerning the wrongful conduct alleged herein and could not have reasonably discovered those facts prior to the disclosures herein. Less than one year has elapsed from the time that Plaintiffs discovered or reasonably could have discovered the facts upon which this Complaint is based to the time that Plaintiffs commenced this action. Less than three years have elapsed between the time that the securities upon which this Count is based were offered to the public and the time Plaintiffs commenced this action.

SECOND CAUSE OF ACTION

For Violations of §12(a)(2) of the 1933 Act Against Cyan, the Executive Defendants and the Underwriter Defendants

55. Plaintiffs incorporate ¶¶1-54 by reference.

56. By means of the defective Prospectus, defendants Cyan, the Executive Defendants and the Underwriter Defendants promoted and sold Cyan stock to Plaintiffs and other members of the Class.

57. The Prospectus contained untrue statements of material fact, and concealed and failed to disclose material facts, as detailed above. The defendants named in this count owed Plaintiffs and the other members of the Class who purchased Cyan common stock pursuant to the Prospectus the duty to make a reasonable and diligent investigation of the statements contained in the Prospectus to ensure that

such statements were true and that there was no omission to state a material fact required to be stated in order to make the statements contained therein not misleading. These defendants, in the exercise of reasonable care, should have known of the misstatements and omissions contained in the Prospectus as set forth above.

58. Plaintiffs did not know, nor in the exercise of reasonable diligence could have known, of the untruths and omissions contained in the Prospectus at the time they acquired Cyan common stock.

59. By reason of the conduct alleged herein, these defendants violated §12(a)(2) of the 1933 Act. As a direct and proximate result of such violations, Plaintiffs and the other members of the Class who purchased Cyan common stock pursuant to the Prospectus sustained substantial damages in connection with their purchases of the stock. Accordingly, Plaintiffs and the other members of the Class who hold the common stock issued pursuant to the Prospectus have the right to rescind and recover the consideration paid for their shares, and hereby tender their common stock to the defendants sued herein. Class members who have sold their common stock seek damages to the extent permitted by law.

THIRD CAUSE OF ACTION

For Violations of §15 of the 1933 Act Against Cyan and the Individual Defendants

60. Plaintiffs incorporate ¶¶1-59 by reference.

61. This Count is brought pursuant to §15 of the 1933 Act against Cyan and the Individual Defendants.

62. The Individual Defendants each were control persons of Cyan by virtue of their positions as direc-

tors and/or senior officers of Cyan. The Individual Defendants each had a series of direct and/or indirect business and/or personal relationships with other directors and/or officers and/or major shareholders of Cyan. The Company controlled the Individual Defendants and all of Cyan's employees.

63. The Individual Defendants each were culpable participants in the violations of §11 of the 1933 Act alleged in the Count above, based on their having signed or authorized the signing of the Registration Statement and having otherwise participated in the process which allowed the IPO to be successfully completed.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief and judgment, as follows:

A. Determining that this action is a proper class action, certifying Plaintiffs as Class representatives under the California Rules of Court and Rules of Civil Procedure, and Plaintiffs' counsel as Class counsel;

B. Awarding compensatory damages in favor of Plaintiffs and the other Class members against all defendants, jointly and severally, for all damages sustained as a result of defendants' wrongdoing, in an amount to be proven at trial, including interest thereon;

C. Awarding Plaintiffs and the Class their reasonable costs and expenses incurred in this action, including counsel fees and expert fees;

D. Awarding rescission or a rescissory measure of damages; and

E. Such equitable/injunctive or other relief as deemed appropriate by the Court.

JURY TRIAL DEMANDED

Plaintiffs hereby demand a trial by jury.

DATED: June 13, 2014

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RECORDS AND BRIEFS

No. 15-1439

IN THE
Supreme Court of the United States

CYAN, INC., *et al.*,

Petitioners,

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, *et al.*,

Respondents.

On Writ of Certiorari to the
Court of Appeal of the State of California,
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QUESTION PRESENTED

Whether state courts lack subject-matter jurisdiction over "covered class actions," 15 U.S.C. § 77v(a), that allege only claims under the Securities Act of 1933.

PARTIES TO THE PROCEEDING

Cyan, Inc., Mark A. Floyd, Michael W. Zellner, Michael L. Hatfield, Paul A. Ferris, Promod Haque, M. Niel Ransom, Michael J. Boustridge, and Robert E. Switz, petitioners here, were the petitioners in the California Court of Appeal.

Beaver County Employees Retirement Fund, Retirement Board of Allegheny County, Delaware County Employees Retirement System, and Jennifer Fleischer, respondents here, were the real parties in interest in the California Court of Appeal.

The Superior Court of California, County of San Francisco, respondent here, was the respondent in the California Court of Appeal.

RULE 29.6 DISCLOSURE STATEMENT

Cyan, Inc., was a publicly held company when this action was filed. On August 3, 2015, Cyan, Inc., was acquired by Ciena Corporation, a publicly held company, and has since ceased to exist as a corporate entity. Other than Ciena Corporation, there is no parent or publicly held company owning 10% or more of Cyan, Inc.'s stock.

Ciena Corporation has no parent corporation. BlackRock, Inc., is a publicly held company that owns 10% or more of Ciena Corporation's stock. No other publicly held company owns 10% or more of Ciena Corporation's stock.

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IN THE

Supreme Court of the United States

No. 15-1439

CYAN, INC., *et al.*,

Petitioners,

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, *et al.*,

Respondents.

On Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District

BRIEF FOR PETITIONERS

OPINIONS BELOW

The order of the California Supreme Court denying the petition for review is unreported. Pet. App. 16a. The order of the California Court of Appeal denying the petition for a writ of mandate, prohibition, or other relief is unreported. *Id.* at 15a. The order of the California Superior Court denying the motion for judgment on the pleadings is unreported. *Id.* at 1a-2a.

JURISDICTION

The California Court of Appeal entered judgment on December 10, 2015, Pet. App. 15a, and the California Supreme Court denied discretionary review on February 24, 2016, *id.* at 16a. The petition for a writ

of certiorari was filed on May 24, 2016, and was granted on June 27, 2017. This Court's jurisdiction rests on 28 U.S.C. § 1257(a). *See* Cyan Cert. Supp. Br. 3-6.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in an addendum to this brief. Add. 1a-25a.

STATEMENT

A. Statutory Background

1. Following the stock market crash of 1929, Congress enacted "a series of laws" directed at the securities industry. *Kokesh* v. *SEC*, 137 S. Ct. 1635, 1639-1640 (2017). The first of those laws was the Securities Act of 1933 (1933 Act), ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77a *et seq.*). The 1933 Act is "primarly concerned" with "new offerings" of securities. *United States* v. *Naftalin*, 441 U.S. 768, 777-778 (1979). It imposes certain registration and disclosure obligations on issuers, the companies making such offerings. *See* 15 U.S.C. § 77b(a)(4); *Omnicare* v. *Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1323 (2015). As a general matter, issuers must file registration statements with the Securities and Exchange Commission (SEC), containing information about themselves and their securities. *See* 15 U.S.C. §§ 77e(a), 77e(c), 77g, 77aa. Any prospectus offering new securities to the public must include such information, too. *See id.* §§ 77e(b), 77j; *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 574 (1995).

The 1933 Act provides express causes of action to enforce these obligations. A person acquiring a security may hold the issuer (and others) liable if a

registration statement "contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. § 77k(a). A purchaser may similarly sue if a prospectus included a material misstatement or omission, *id.* § 77*l*(a)(2), or if a person offers or sells a security without any valid registration statement or prospectus, *id.* §§ 77e, 77*l*(a)(1).

Section 22(a) of the 1933 Act governs where such claims may be heard. *Id.* § 77v(a). Its first sentence is a *jurisdictional* provision. As originally enacted, it provided:

> The district courts of the United States * * * shall have jurisdiction of offenses and violations under [the 1933 Act] and under the rules and regulations promulgated by the Commission in respect thereto, and, *concurrent with State and Territorial courts*, of all suits in equity and actions at law brought to enforce any liability or duty created by [the 1933 Act].

Ch. 38, § 22(a), 48 Stat. at 86 (emphasis added) (codified at 15 U.S.C. § 77v(a)). Thus, under the original 1933 Act, plaintiffs could choose to bring their 1933 Act claims in either federal or state court.

The penultimate sentence of Section 22(a) is an *anti-removal* provision. In the original 1933 Act, it stated: "No case arising under [the 1933 Act] and brought in any State court of competent jurisdiction shall be removed to any court of the United States." *Id.* § 22(a), 48 Stat. at 87 (codified at 15 U.S.C. § 77v(a)). The effect of this provision was to preserve the plaintiff's choice of forum; a plaintiff who chose to pursue a 1933 Act claim in state court could do so

even if the defendant preferred to litigate in federal court.

2. In 1995, bipartisan supermajorities of both houses of Congress passed the Private Securities Litigation Reform Act (Reform Act), Pub. L. No. 104-67, 109 Stat. 737, over the President's veto. The Reform Act was prompted by fears that the "private securities litigation system" was being "undermined by those who seek to line their own pockets by bringing abusive and meritless suits." H.R. Conf. Rep. No. 104-369, at 31 (1995). Of particular concern were "nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and 'manipulation by class action lawyers of the clients whom they purportedly represent'"—abuses that "had become rampant" in the years leading up to the Reform Act. *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 81 (2006) (quoting H.R. Conf. Rep. No. 104-369, at 31). "Proponents of the Reform Act argued that these abuses resulted in extortionate settlements, chilled any discussion of issuers' future prospects, and deterred qualified individuals from serving on boards of directors," *id.*, ultimately harming the very people the securities laws were meant to protect: investors. *See* H.R. Conf. Rep. No. 104-369, at 31-32.

To curb these abuses, the Reform Act amended the 1933 Act by establishing a number of protections that apply to 1933 Act claims. (It also amended the Securities Exchange Act of 1934 (1934 Act), 15 U.S.C. § 78a *et seq.*, in similar ways.) Most of the protections added to the 1933 Act are specific to 1933 Act claims brought as class actions pursuant to the Federal Rules of Civil Procedure, which Congress

regarded as the greatest source of abuse. *See id.* § 77z-1(a); *Dabit*, 547 U.S. at 81. For instance:

- To "discourage the use of professional plaintiffs" as class representatives, H.R. Conf. Rep. No. 104-369, at 33, the Reform Act requires that each lead plaintiff file a sworn certification stating, among other things, that "the plaintiff did not purchase the security that is the subject of the complaint at the direction of plaintiff's counsel," 15 U.S.C. § 77z-1(a)(2)(A)(ii). The Reform Act also forbids the payment of bounties to class representatives, requiring that their share of any final judgment be calculated instead on the same per-share basis as that of other class members. *Id.* § 77z-1(a)(4).
- To ensure that the class is represented by those "most capable" of doing so, the Reform Act establishes a process for determining the "most adequate plaintiff." *Id.* § 77z-1(a)(3). That process allows any class member to move to serve as lead plaintiff, and requires the court to presume that the "most adequate plaintiff" is whoever has "the largest financial interest in the relief sought by the class." *Id.* § 77z-1(a)(3)(A)(i), (B)(iii)(I).
- And to prevent lawyer-driven class settlements, the Reform Act restricts any award of attorneys' fees and expenses to a "reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." *Id.* § 77z-1(a)(6). The Reform Act also generally prohibits the filing of settlement agreements under seal and requires the disclosure of meaningful information to class members when the parties

have reached a proposed settlement. *Id.* § 77z-1(a)(5), (7).

In addition to these class-action-specific reforms, the Reform Act established several protections that apply to *all* 1933 Act claims, whether brought as class actions or not. For example, the Reform Act provides, with limited exceptions, for an automatic stay of discovery pending resolution of any motion to dismiss. *Id.* § 77z-1(b). It requires the court to make "specific findings" regarding whether any party or attorney should be subject to sanctions for abusive litigation under Federal Rule of Civil Procedure 11. *Id.* § 77z-1(c). It creates a safe harbor from 1933 Act liability for forward-looking statements made in particular circumstances. *Id.* § 77z-2(a), (c); *see also id.* § 77z-2(b)(2)(D) (excluding from the safe harbor any forward-looking statement "made in connection with an initial public offering"). And it excepts outside directors from joint and several liability for certain 1933 Act violations. *Id.* § 77k(f).

In the years following its enactment, however, the Reform Act had "an unintended consequence: It prompted at least some members of the plaintiffs' bar to avoid the federal forum altogether." *Dabit*, 547 U.S. at 82. That is because the Reform Act's protections do not apply at all to state-law claims. And even as to 1933 Act claims, most of the Reform Act's protections apply only in federal court; indeed, none of the class-action-specific reforms applies in state court. *See, e.g.*, 15 U.S.C. § 77z-1(a)(1) (limiting the application of the class-action-specific reforms to "private action[s] arising under this subchapter" that are "brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure").

3. In 1998, Congress enacted the Securities Litigation Uniform Standards Act (SLUSA) to stem this "shift[] from Federal to State courts." Pub. L. No. 105-353, § 2(2), 112 Stat. 3227, 3227. SLUSA did so in two ways.

First, SLUSA amended Section 16 of the 1933 Act to include a new *preclusion* provision in Section 16(b), prohibiting plaintiffs from refashioning certain 1933 Act claims as claims under state law. Section 16(b) states that "[n]o covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging" either "(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security" or "(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." 15 U.S.C. § 77p(b); *see also id.* § 77p(d) (excepting certain actions, such as actions based on the law of the State in which the issuer is incorporated, from the scope of preclusion). And just in case state courts are not faithful to this preclusion provision, Section 16(c), which SLUSA also added, provides for the removal of "[a]ny covered class action brought in any State court involving a covered security, as set forth in subsection (b)"—thus allowing the preclusion determination to be made by a federal court. *Id.* § 77p(c); *see Kircher* v. *Putnam Funds Tr.*, 547 U.S. 633, 642-643 (2006).

Second, SLUSA amended the *jurisdictional* and *anti-removal* provisions of Section 22(a) to ensure that certain 1933 Act claims would be litigated only in federal court. SLUSA did so by inserting an exception into each provision. Thus, the jurisdic-

tional provision now states that "district courts * * * shall have jurisdiction * * *, concurrent with State and Territorial courts, *except as provided in section [16] with respect to covered class actions*, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter"—this "subchapter" being the 1933 Act. 15 U.S.C. § 77v(a) (emphasis added); *see id.* § 77a; Pub. L. No. 105-353, § 101(a)(3)(A), 112 Stat. at 3230. And the anti-removal provision now states: "*Except as provided in section [16(c)]*, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States." 15 U.S.C. § 77v(a) (emphasis added); *see* Pub. L. No. 105-353, § 101(a)(3)(B), 112 Stat. at 3230.

Finally, SLUSA provides definitions for "covered class action" and "covered security" in Section 16. A "covered class action" means, among other things, a "single lawsuit in which * * * damages are sought on behalf of more than 50 persons or prospective class members" and in which questions of law or fact common to the class "predominate" over individualized issues (leaving aside "issues of individualized reliance"). 15 U.S.C. § 77p(f)(2)(A)(i)(I); *see also id.* § 77p(f)(2)(A)(i)(II), (ii) (describing other actions that qualify as "covered class action[s]"). And a "covered security" means a security listed on a national exchange (such as the New York Stock Exchange) or issued by a registered investment company. *Id.* §§ 77p(f)(3), 77r(b)(1)-(2).

B. Respondents' Suit

Cyan, Inc., was a company that supplied hardware and software for communications networks. J.A. 18. In May 2013, Cyan conducted its initial public offer-

ing (IPO), J.A. 13, and its stock began trading on the New York Stock Exchange. Pet. 9; *see also Credit Suisse Sec. (USA) LLC* v. *Billing*, 551 U.S. 264, 268 (2007) ("An IPO presents an opportunity to raise capital for a new enterprise by selling shares to the investing public.").

In 2014, following a drop in stock price, J.A. 27-28, respondents sued Cyan and its officers and directors (collectively, Cyan) in California Superior Court, seeking damages on behalf of a putative class of purchasers of Cyan's stock, J.A. 15, 28, 33. The complaint claimed that the registration statement and prospectus issued in connection with Cyan's IPO contained material misstatements and omissions, in violation of the 1933 Act. J.A. 30-33. The complaint did not assert any claims under state law. *Id.*

The Superior Court overruled Cyan's demurrer to the complaint, J.A. 5, and certified a class, J.A. 8. Cyan then moved for judgment on the pleadings for lack of subject-matter jurisdiction. J.A. 8-9. Cyan argued that SLUSA's amendment to Section 22(a)'s jurisdictional provision divested state courts of concurrent jurisdiction over "covered class actions" alleging only 1933 Act claims. *See* Cyan Mem. of P. & A. in Supp. of Mot. for J. on the Pleadings 5-8.

Respondents did not dispute that they had brought a "covered class action" as defined in Section 16 of the 1933 Act. *See* Pls.' Opp. to Mot. for J. on the Pleadings 1 n.2; Br. in Opp. 3. The Superior Court nevertheless denied Cyan's motion, explaining that its "hands [we]re tied" by the California Court of Appeal's decision in *Luther* v. *Countrywide Financial Corp.*, 125 Cal. Rptr. 3d 716 (Ct. App. 2011). Pet. App. 1a, 5a-6a. According to *Countrywide*, "concur-

rent jurisdiction" over a "covered class action" arising under the 1933 Act "survived the amendments to the 1933 Act" made by SLUSA. 125 Cal. Rptr. 3d at 721.

Cyan filed a petition for a writ of mandate, prohibition, or other relief in the California Court of Appeal, challenging the Superior Court's jurisdiction under SLUSA. Pet. App. 32a. The Court of Appeal denied the petition without opinion, *id.* at 15a, and the California Supreme Court denied discretionary review, *id.* at 16a.

This Court granted certiorari.

SUMMARY OF ARGUMENT

SLUSA amended the 1933 Act's jurisdictional provision. That provision formerly granted state courts concurrent jurisdiction to decide claims under the 1933 Act, without exception. But as amended by SLUSA, state courts now enjoy such jurisdiction, "except as provided in section 16 with respect to covered class actions." Pub. L. No. 105-353, § 101(a)(3)(A), 112 Stat. at 3230 (codified at 15 U.S.C. § 77v(a)).

I. The plain text of the "except" clause divests state courts of concurrent jurisdiction over 1933 Act claims in covered class actions. The word "except" announces an "except[ion]" to state-court jurisdiction. The words "as provided in section 16" point the reader to Section 16, which "provide[s]" a definition of a "covered class action." And the words "covered class actions" specify what actions the exception covers. The text is thus naturally read to except 1933 Act claims in covered class actions, as defined in Section 16, from the concurrent jurisdiction of state courts.

The structure of the 1933 Act, as amended by SLUSA, reinforces that reading. The addition of the "except" clause was part of a package of amendments that included two other changes—the addition of a preclusion provision and the amendment of the anti-removal provision. The first addressed covered class actions involving only *state-law* claims of particular federal concern, and the second addressed covered class actions involving a *mix* of such state-law claims and 1933 Act claims. The point of both amendments was to prevent those types of covered class actions from being used to evade the Reform Act's protections against class-action abuse. The addition of the "except" clause should be understood as doing the same for the only category of covered class actions of federal concern remaining—covered class actions involving only *1933 Act* claims—by excepting those actions from the concurrent jurisdiction of state courts. Construing the "except" clause in that way honors the "symmetrical and coherent regulatory scheme" that Congress presumably intended. *Gustafson*, 513 U.S. at 569.

That construction also accords with SLUSA's history and purposes. Excepting 1933 Act claims in covered class actions from state-court jurisdiction advances all three of Congress's goals in enacting SLUSA. First, it serves the overall objectives of the Reform Act, by ensuring that such claims are heard in federal court, where all of the Reform Act's protections apply. Second, it stems the tide of securities class actions being filed in state rather than federal court, by making federal court the exclusive venue for almost all such actions. And third, it helps achieve "Uniform Standards," as referenced in the statute's title, for the type of "Securities Litigation"

that Congress cared about most—covered class actions involving nationally traded securities—by preventing such actions from being heard in state court, where they would be subject to disparate procedural rules.

Finally, administrative simplicity is a virtue in jurisdictional rules. And requiring 1933 Act claims in covered class actions to be heard in federal court would be a straightforward rule to administer. Indeed, there is often no dispute over whether a suit is a covered class action, just as there is no dispute in this case: Everyone agrees that respondents' suit is a covered class action alleging only 1933 Act claims.

In short, all of the traditional tools of statutory construction lead to the same conclusion: SLUSA withdrew 1933 Act claims in covered class actions from the concurrent jurisdiction of state courts. The California Superior Court thus lacks jurisdiction over respondents' suit in this case.

II. Respondents' and the United States' competing interpretations of the "except" clause should be rejected.

A. According to respondents, the "except" clause does not except *any* 1933 Act claims from state-court jurisdiction. Instead, respondents argue, the clause reflects the fact that certain state-law class actions are *precluded* under SLUSA. But preclusion and jurisdiction are entirely different concepts. When an action is precluded, it must be dismissed for failure to state a claim, not for lack of jurisdiction. So an "except" clause about preclusion, which creates no "except[ion]" to jurisdiction at all, cannot be squared with the text or common sense.

There are other problems with respondents' reading. If adopted, it would mean that in plugging the Reform Act's loopholes, Congress simply failed to address covered class actions involving only 1933 Act claims—leaving that gaping loophole wide open. It would also defy Congress's intent in other ways, by causing 1933 Act claims in covered class actions to be stuck in state court instead of shifting them back to federal court, and by exposing such claims to the procedural standards of 50 States instead of placing them under uniform national standards.

B. The United States similarly resists reading the "except" clause to except *any* 1933 Act claims from state-court jurisdiction. But unlike respondents, the United States argues that SLUSA should be construed to allow 1933 Act covered class actions analogous to the state-law covered class actions precluded by SLUSA to be removed to federal court. That reading of SLUSA is certainly more faithful to the statutory scheme than respondents' reading. After all, it would allow at least some 1933 Act covered class actions filed in state court to make their way into a federal forum, where they would be subject to all of the Reform Act's protections.

But the United States' position still fails to give any meaningful effect to the "except" clause. Its principal submission is that Congress added the "except" clause to make clear that in class actions involving a mix of 1933 Act claims and state-law claims precluded by SLUSA, state courts lack jurisdiction over the state-law claims. But again, preclusion and jurisdiction are two different things. And even if preclusion implied a lack of jurisdiction, the United States' reading would still make no sense, because *federal* courts would lack jurisdiction over

the state-law claims, too. That Congress wrote an "except" clause that applies only to the jurisdiction of *state* courts is reason enough to reject the United States' reading.

The judgment of the California Court of Appeal should be reversed.

ARGUMENT

Prior to SLUSA, the first sentence of Section 22(a) of the 1933 Act gave state courts concurrent jurisdiction over claims arising under the 1933 Act. SLUSA amended that jurisdictional provision by inserting twelve new words: "except as provided in section 16 with respect to covered class actions." Pub. L. No. 105-353, § 101(a)(3)(A), 112 Stat. at 3230 (codified at 15 U.S.C. § 77v(a)).

The question in this case is what that clause means. All of the traditional tools of statutory construction point to the same answer: The "except" clause divests state courts of jurisdiction over 1933 Act claims in "covered class actions," a term defined in Section 16. The California Superior Court thus lacks jurisdiction over respondents' covered class action in this case, which alleges only 1933 Act claims.

I. SLUSA DIVESTED STATE COURTS OF CONCURRENT JURISDICTION OVER 1933 ACT CLAIMS IN COVERED CLASS ACTIONS

1. "Start, as [this Court] always do[es], with the statutory language." *Advocate Health Care Network* v. *Stapleton*, 137 S. Ct. 1652, 1658 (2017). As amended by SLUSA, the text of the first sentence of Section 22(a) provides:

> The district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, *except as provided in section [16] with respect to covered class actions*, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter.

15 U.S.C. § 77v(a) (emphasis added).

Before SLUSA added the italicized twelve words, "[t]he district courts of the United States" had "jurisdiction * * *, concurrent with State * * * courts, * * * of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter." *Id.* "[T]his subchapter" refers to the 1933 Act. *See id.* § 77a ("This subchapter may be cited as the 'Securities Act of 1933.'"). So, pre-SLUSA, Section 22(a) granted state courts concurrent jurisdiction over all 1933 Act claims.

SLUSA changed that. "When Congress acts to amend a statute," it presumably "intends its amendment to have real and substantial effect." *United States* v. *Quality Stores, Inc.*, 134 S. Ct. 1395, 1401 (2014) (internal quotation marks omitted). In SLUSA, Congress amended the 1933 Act by creating an express "except[ion]" to Section 22(a)'s grant of concurrent jurisdiction. 15 U.S.C. § 77v(a). That amendment must be read to "except" *some* category of 1933 Act claims from the "concurrent" "jurisdiction" of "State" courts.

The text of the amendment tells us precisely what that category is: 1933 Act claims in "covered class actions," "as provided in section [16]." *Id.* Section 16 provides a definition of a "covered class action." *Id.* § 77p(f)(2). And the words "as provided in section [16]" serve to cross-reference that definition. Without those words, the term "covered class actions" in Section 22(a) would be undefined. That is because Section 22(a) lacks any definitions of its own, and because the definitions found in Section 16 are otherwise applicable only to the provisions of Section 16 itself. *See id.* § 77p(f) ("For purposes of *this section*, the following definitions shall apply * * *." (emphasis added)). The words "as provided in section [16]" are thus necessary to give content to Section 22(a)'s reference to "covered class actions." *See* Mitchell A. Lowenthal & Shiwon Choe, *State Courts Lack Jurisdiction To Hear Securities Act Class Actions, but the Frequent Failure To Ask the Right Question Too Often Produces the Wrong Answer*, 17 U. Pa. J. Bus. L. 739, 755 (2015). The meaning of the text is plain: State courts lack jurisdiction over 1933 Act claims in "covered class actions," as defined in Section 16.

2. The structure of the 1933 Act, as amended by SLUSA, reinforces that interpretation. "The 1933 Act, like every Act of Congress, should not be read as a series of unrelated and isolated provisions." *Gustafson*, 513 U.S. at 570. Rather, it should "be interpreted as a symmetrical and coherent regulatory scheme." *Id.* at 569. Accordingly, SLUSA's addition of an "except" clause to Section 22(a)'s jurisdictional provision should be understood in light of SLUSA's other amendments—namely, its addition of a preclu-

sion provision to Section 16 and its amendment of the anti-removal provision in Section 22(a).

Consider first SLUSA's addition of a preclusion provision to Section 16. That provision, Section 16(b), addresses covered class actions of a specific type: covered class actions based on *state* law that are of particular federal concern because they allege untruth or deception in connection with covered securities (which, generally speaking, are traded on national exchanges). *See* 15 U.S.C. §§ 77p(b), 77p(f)(3), 77r(b)(1). The preclusion provision provides that such state-law actions may not be "maintained" at all; whether brought in state or federal court, they must be dismissed. *Id.* § 77p(b); *see Kircher*, 547 U.S. at 636 n.1. If they are brought in state court and the state court fails to dismiss them, they may be removed under Section 16(c) to federal court and must be dismissed there. 15 U.S.C. § 77p(c). The bottom line is this: The preclusion provision addresses *state-law* covered class actions, and says that if they involve claims of particular federal concern, they cannot be maintained in any court, including state court.

Next consider SLUSA's amendment to the anti-removal provision in Section 22(a). As amended, that provision addresses *mixed* covered class actions—covered class actions involving a mix of 1933 Act *and* state-law claims. *See id.* § 77v(a). That much is clear from the text of the amended provision itself, which states: "Except *as provided in section [16(c)]*, no case *arising under this subchapter* and brought in any State court of competent jurisdiction shall be removed to any court of the United States." *Id.* (emphases added). The text thus contemplates a covered class action that not only "aris[es] under this

subchapter" but also falls within the scope of "section [16(c)]"—which is to say, that involves *both* 1933 Act *and* state-law claims. And by allowing for the removal of such an action to federal court—where the state-law claims would be dismissed and the 1933 Act claims adjudicated—the amended provision offers the 1933 Act claims a way out of state court.

That leaves SLUSA's addition of the "except" clause to Section 22(a)'s jurisdictional provision. That amendment should be understood as forming part of the same "symmetrical and coherent regulatory scheme" as the amendments just discussed. *Gustafson*, 513 U.S. at 569. If the preclusion provision addresses *state-law* covered class actions, and if the amendment to the anti-removal provision addresses *mixed* covered class actions, then the "except" clause in the jurisdictional provision should naturally be understood to address the only category of covered class actions of federal concern remaining: *1933 Act* covered class actions. That is, the clause should be construed as excepting 1933 Act claims in covered class actions from the jurisdiction of state courts.

A different construction would leave a gaping hole in the regulatory scheme. Just imagine if Congress had added the preclusion provision and amended the anti-removal provision, but then stopped there, leaving the jurisdictional provision untouched. State-law covered class actions of particular federal concern would be subject to dismissal or removal from state court, and 1933 Act claims in mixed covered class actions would be removable as well. But 1933 Act claims brought on their own in a covered class action would be stuck in state court. They could not even be removed. That is because, absent an amendment to the jurisdictional provision, they

would be "case[s] arising under this subchapter and brought in [a] State court of competent jurisdiction," their path to federal court blocked by the anti-removal provision. 15 U.S.C. § 77v(a). Plaintiffs could thus guarantee their choice of a state forum—where most of the Reform Act's protections do not apply—simply by bringing covered class actions alleging *only* 1933 Act claims.

That cannot be the regulatory scheme that Congress intended. If Congress intended a 1933 Act claim brought *alongside* a state-law claim to be removable to federal court—where it would be subject to all of the Reform Act's protections—then surely it intended a 1933 Act claim brought *by itself* to be litigated in federal court as well. Construing the "except" clause to apply to covered class actions alleging only 1933 Act claims ensures that such actions, when brought in state court, will be either dismissed for lack of jurisdiction or removed to a federal forum. *See* 28 U.S.C. § 1441(a) (providing generally for the removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction"). Section 22(a)'s anti-removal provision would not stand in the way of the latter, because that provision bars removal only when the state court is a court of "competent jurisdiction"—which the state court would not be because of the "except" clause. 15 U.S.C. § 77v(a); *see, e.g.*, *Hung* v. *iDreamSky Tech. Ltd.*, No. 15-cv-2514, 2016 WL 299034, at *2 (S.D.N.Y. Jan. 25, 2016); *Knox* v. *Agria Corp.*, 613 F. Supp. 2d 419, 425 (S.D.N.Y. 2009). The structure of the statute thus confirms what the text alone establishes: The "except" clause should be read to divest state courts of

jurisdiction over 1933 Act claims in covered class actions.

3. That interpretation also squares with the history and purposes behind SLUSA. Congress enacted findings as part of SLUSA and included them in the statutory text as a preamble. *See* Pub. L. No. 105-353, § 2, 112 Stat. at 3227; Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 217 (2012) ("A preamble, purpose clause, or recital is a permissible indicator of meaning."). Those findings make clear that in enacting SLUSA, Congress sought to accomplish three interrelated goals. First, Congress sought to set the Reform Act on a course toward "fully achieving its objectives." *See* Pub. L. No. 105-353, § 2(1), (3), (5), 112 Stat. at 3227. Second, Congress sought to stem the "shift[] from Federal to State courts" of filings of "securities class action lawsuits." *Id.* § 2(2), 112 Stat. at 3227. And third, Congress sought to "enact national standards for securities class action lawsuits involving nationally traded securities." *Id.* § 2(5), 112 Stat. at 3227. Construing the "except" clause as divesting state courts of jurisdiction over 1933 Act claims in covered class actions advances each of those goals.

First, Congress enacted SLUSA to make good on the promise of the Reform Act. *Id.* § 2(1), (3), (5), 112 Stat. at 3227. Congress had passed the Reform Act in 1995 with the hopes of "put[ting] an end to vexatious litigation that was draining value from the shareholders and employees of public companies." H.R. Rep. No. 105-640, at 9 (1998). But Congress soon found that "plaintiffs' lawyers [were] circumvent[ing] the Act's provisions by * * * filing frivolous and speculative lawsuits in State court, where essentially none of the Reform Act's procedural or

substantive protections against abusive suits are available." H.R. Conf. Rep. No. 105-803, at 14-15 (1998). So Congress enacted SLUSA to finish the job the Reform Act had started—or, as a primary sponsor of SLUSA put it, to "perfect what [Congress] did in 1995, to make it work right." 144 Cong. Rec. H6057 (daily ed. July 21, 1998) (statement of Rep. Rick White); *see also* H.R. Rep. No. 105-640, at 8-9 ("The purpose of [SLUSA] is to prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than in Federal, court.").

Eliminating state-court jurisdiction over 1933 Act claims in covered class actions does just that. Most of the Reform Act's protections—including all of its class-action-specific reforms—apply only to 1933 Act claims brought in federal court. *See supra* p. 6. By excepting 1933 Act claims in covered class actions from state-court jurisdiction, the "except" clause makes federal court the only place where such claims may be heard—closing the Reform Act's "loophole," S. Rep. No. 105-182, at 9 (1998), and bringing that Act closer to "fully achieving" its promised reforms, Pub. L. No. 105-353, § 2(3), 112 Stat. at 3227.

Second, and relatedly, Congress wanted to stem the tide of securities class actions being filed in state, rather than federal, court. *See id.* § 2(2), 112 Stat. at 3227; *Dabit*, 547 U.S. at 82; S. Rep. No. 105-182, at 3. What concerned Congress was not just the growing number of state-court filings alleging violations of *state* law, but also the growing number of state-court filings alleging violations of *federal* law. *See* S. Rep. No. 105-182, at 3 (quoting testimony that plaintiffs had sought "to establish alternative state court venues for settlement of federal claims"); 144

Cong. Rec. H6057 (daily ed. July 21, 1998) (statement of Rep. White) ("One thing we discovered is that suits that were formerly brought in Federal court under the old days were now being brought in State court as a way of getting around the statute that we passed."); *Securities Litigation Abuses: Hearing on the Effectiveness of the Private Securities Litigation Reform Act of 1995 Before the Subcomm. on Sec. of the S. Comm. on Banking, Hous. & Urban Affairs*, 105th Cong. 22 (July 24, 1997) (statement of Richard I. Miller, Gen. Counsel & Sec'y, Am. Inst. of Certified Pub. Accountants) (observing that "the ability of plaintiffs to take Federal securities class action cases, cases that are traditionally * * * filed in Federal court, to State courts, is a major loophole" of the Reform Act).

So in enacting SLUSA, Congress set out to "make[] Federal court the *exclusive* venue for most securities class action lawsuits"—including those under the 1933 Act. H.R. Conf. Rep. No. 105-803, at 13 (emphasis added). Members of Congress described SLUSA in those terms. *See, e.g.*, 144 Cong. Rec. E1424 (daily ed. July 24, 1998) (statement of Rep. Jane Harman, cosponsor) ("The measure before us * * * would generally proscribe bringing a private class action suit involving 50 or more parties except in Federal court."); *id.* at H10,776 (daily ed. Oct. 13, 1998) (statement of Rep. John Dingell) ("By making Federal courts the *exclusive* venue for most of the securities class action lawsuits, [SLUSA] imposes the standards of the [Reform Act] on all securities class actions lawsuits, except those narrow instances specifically excluded by [SLUSA]." (emphasis added)); *The Securities Litigation Uniform Standards Act of 1997: Hearing on H.R. 1689 Before the Sub-*

comm. on Fin. & Hazardous Materials of the H. Comm. on Commerce, 105th Cong. 1 (May 19, 1998) [hereinafter *House Hearing*] (statement of Rep. Tom Bliley, Comm. Chairman) ("This legislation makes Federal court the *exclusive* venue for securities class actions." (emphasis added)).

And when the President signed SLUSA into law, he likewise recognized that, under the new legislation, "class actions generally c[ould] be brought *only* in Federal court, where they w[ould] be governed by Federal law." President William J. Clinton, Statement on Signing the Securities Litigation Uniform Standards Act of 1998, 34 Weekly Comp. Pres. Doc. 2247, 2248 (Nov. 3, 1998) (emphasis added). The SEC shared the same view. *See* Letter from SEC Chairman Arthur Levitt et al. to Sen. Alfonse M. D'Amato et al. (Mar. 24, 1998) ("[T]he bill generally provides that class actions can be brought *only* in federal court where they will be governed by federal law." (emphasis added)), *reprinted in* 144 Cong. Rec. H6062 (daily ed. July 21, 1998).

Indeed, even witnesses who testified against the legislation acknowledged that it would require that 1933 Act class actions be heard in federal court. *See The Securities Litigation Uniform Standards Act of 1997: Hearing on S. 1260 Before the Subcomm. on Sec. of the S. Comm. of Banking, Hous. & Urban Affairs*, 105th Cong. 24 (Oct. 29, 1997) (statement of Herbert E. Milstein, Nat'l Ass'n of Sec. & Commercial Law Att'ys) ("[SLUSA] will preclude States from hearing actions under the 1933 Act, which they have had since that Act was passed."); *House Hearing*, *supra*, at 73 (statement of Richard W. Painter, Prof., Cornell Univ. Law Sch.) ("Investors should not now be told that their only remedy for fraud is in Federal

court and under Federal law."); *id.* at 116 (statement of Mary Rouleau, Legislative Dir., Consumer Fed'n of Am.) (calling SLUSA "overly broad" partly because "it would prevent state courts from trying claims based on federal law violations"). As one leading commentator summed it up, SLUSA would "eliminate concurrent state jurisdiction over 1933 Act claims in favor of exclusive jurisdiction in the federal courts." Michael A. Perino, *Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 Stan. L. Rev. 273, 335 (1998).

None of these statements would make much sense unless the "except" clause divested state courts of jurisdiction over 1933 Act claims in covered class actions. Only by withdrawing such jurisdiction from state courts would "Federal court" become "the *exclusive* venue for most securities class action lawsuits," H.R. Conf. Rep. No. 105-803, at 13 (emphasis added), and the "*only*" place where "class actions generally can be brought," 34 Weekly Comp. Pres. Doc. at 2248 (emphasis added). The "except" clause should thus be understood to accomplish precisely what members of Congress, the President, the SEC, and others all expected SLUSA to do: shift 1933 Act claims in covered class actions back into federal court.

Third, as the name of the statute suggests, Congress wanted to create "Uniform Standards" for "Securities Litigation." Pub. L. No. 105-353, § 1, 112 Stat. at 3227. Foremost on Congress's mind were "securities class action lawsuits involving nationally traded securities," *id.* § 2(5), 112 Stat. at 3227—known as "covered securit[ies]" under the statute, 15 U.S.C. §§ 77p(f)(3), 77r(b)(1). The federal interest is greatest in suits, like this one, involving such securi-

ties. *See Dabit*, 547 U.S. at 78 ("The magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated."). So Congress wanted to make sure that those suits, in particular, were governed by "national standards." Pub. L. No. 105-353, § 2(5), 112 Stat. at 3227.

To accomplish that goal, Congress understood that preclusion of state-law class actions would be necessary but not sufficient. It would be necessary because, without preclusion, issuers and other defendants could face class actions not just under the 1933 Act but also the laws of the fifty States. Accordingly, Congress enacted a preclusion provision in Section 16(b) to ensure that most class actions involving covered securities proceed under the same *substantive* standards of the 1933 Act. 15 U.S.C. § 77p(b).

But Congress understood that preclusion would not be sufficient, because genuine uniformity is about more than just substance; it is about procedure, too. "Disparate, and shifting, state litigation *procedures*" also "foster fragmentation of our national system of securities litigation." S. Rep. No. 105-182, at 3 (emphasis added) (quoting the hearing testimony of Stephen M.H. Wallman, Comm'r, SEC); *see also* 144 Cong. Rec. S4790 (daily ed. May 13, 1998) (statement of Sen. Christopher Dodd, cosponsor and manager) (discussing the need to address "'[d]isparate, and shifting, state litigation procedures'"); *id.* at H10,779 (daily ed. Oct. 13, 1998) (statement of Rep. Mike Oxley, manager) ("[SLUSA] creates a national standard under which securities class actions must be filed and that standard is the one that Congress resoundingly approved back in 1995."). Thus, so long as plaintiffs could bring their 1933 Act class actions

in *either* state *or* federal court, class actions involving nationally traded securities would not be governed by national standards at all.

Take, for example, the rules governing the conduct of class-action plaintiffs. Under the Reform Act, "[e]ach plaintiff seeking to serve as a representative party on behalf of a class shall provide a sworn certification" stating, among other things, that "the plaintiff did not purchase the security that is the subject of the complaint at the direction of plaintiff's counsel," and that "the plaintiff will not accept any payment for serving as a representative party * * * beyond the plaintiff's pro rata share of any recovery." 15 U.S.C. § 77z-1(a)(2)(A)(ii), (vi). Congress enacted these requirements to address "abuses involving the use of 'professional plaintiffs,'" who pursue meritless class actions in the hopes of receiving "the payment of a bounty or bonus" for doing so. H.R. Conf. Rep. No. 104-369, at 32-33. But these reforms apply only in federal court; they do not apply in state court. *See* 15 U.S.C. § 77z-1(a)(1). Thus, prior to SLUSA, some defendants enjoyed the benefit of these protections, while others did not, depending on where the plaintiffs had chosen to sue. *See* S. Rep. No. 105-182, at 3 (documenting a "substitution effect" whereby some plaintiffs file in state rather than federal court (internal quotation marks omitted)). The same defendant could even face "parallel" litigation in both state and federal court, each forum applying a different set of rules governing the conduct of class-action plaintiffs. *Id.* (internal quotation marks omitted); *see also* H.R. Conf. Rep. No. 105-803, at 14 (documenting the same phenomenon).

And that is just one example. As outlined above, the Reform Act contains a host of other protections

aimed at ensuring the most capable class representatives, preventing lawyer-driven class settlements, and strengthening the application of Rule 11 sanctions. *See supra* pp. 4-6. By the terms of the statute, none of those protections applies in state court. *See* 15 U.S.C. § 77z-1(a)(1), (c). In addition, some state courts in 1933 Act suits have refused to stay discovery pending a motion to dismiss, on the view that the Reform Act's automatic-stay provision does not apply in state court either. *See id.* § 77z-1(b)(1); Order Den. Mot. To Stay Proceedings 3, *Buelow* v. *Alibaba Grp. Holding Ltd.*, No. CIV 535692 (Cal. Super. Ct. Apr. 1, 2016); Order Den. Defs.' Mot. To Stay Proceedings 9-10, *In re Pac. Biosciences of Cal. Inc. Sec. Litig.*, No. CIV 509210 (Cal. Super. Ct. May 24, 2012). If that view were correct, plaintiffs under the pre-SLUSA scheme would have been free to do in state court what they may not do in federal court: impose on "innocent parties" the heavy "cost of discovery," "forc[ing] [them] to settle frivolous securities class actions." H.R. Conf. Rep. No. 104-369, at 37. All of this is to say that as long as state courts remained open to hear 1933 Act class actions, defendants would have been subject to "[d]isparate, and shifting, state litigation procedures," undermining the possibility of uniformity in the resolution of class actions involving nationally traded securities. S. Rep. No. 105-182, at 3 (internal quotation marks omitted).

To achieve uniformity, then, Congress had to ensure that covered class actions involving nationally traded securities were not only governed by federal law, but also heard in federal court. In the words of Senator Alfonse D'Amato, then-chairman of the Senate Banking Committee: "There should be a

uniform standard, and there should be a uniform procedure. And that is why we moved these nationally traded securities *** to a Federal forum." 144 Cong. Rec. S4780, S4808 (daily ed. May 13, 1998). Or as the conference committee's report put it, "class actions relating to a 'covered security' *** alleging fraud or manipulation must be maintained pursuant to the provisions of Federal securities law, in Federal court (subject to certain exceptions)." H.R. Conf. Rep. No. 105-803, at 13.

In other committee reports, committee hearings, and floor speeches, the same point was made again and again: Covered class actions involving nationally traded securities "could not be based on state law and could *only* be maintained in federal courts." S. Rep. No. 105-182, at 9-10 (emphasis added) (Congressional Budget Office cost estimate); *see also, e.g.*, H.R. Rep. No. 105-640, at 13 (same); *id.* at 45 (dissenting views) ("The bill requires *** class actions [involving covered securities] to be brought in federal court pursuant to federal law ***."); 143 Cong. Rec. S10,475 (daily ed. Oct. 7, 1997) (statement of Sen. Phil Gramm, primary sponsor and manager) ("What our bill does is very simply this. *** [I]f a stock is traded on the national market, *** then the class-action suit has to be filed in Federal court."); 144 Cong. Rec. H6060 (daily ed. July 21, 1998) (statement of Rep. Christopher Cox, cosponsor and manager) ("[T]his legislation will make federal courts the exclusive venue for large-scale securities fraud lawsuits involving securities subject to federal regulation ***."); *id.* at H10,771 (daily ed. Oct. 13, 1998) (statement of Rep. Bliley) ("The premise of [SLUSA] is simple: lawsuits alleging violations that involve securities that are offered nationally belong in Fed-

eral court."); *House Hearing*, *supra*, at 4 (statement of Rep. White) ("[The bill] mak[es] sure that class action suits with securities that are traded on the three major securities trading exchanges in our country have to be subject to the rules that we passed last time and have to go to Federal court.").

In short, Congress recognized that, to achieve uniformity, it would have to do more than preclude class actions involving covered securities from being brought under state law; Congress would also have to prevent such actions under the 1933 Act from being brought in state court. And that is exactly what the "except" clause does: It provides that such actions under the 1933 Act may be heard only in a federal forum.

To be sure, because the "except" clause applies to 1933 Act claims in *any* "covered class action" as defined in Section 16, it divests state courts of jurisdiction over 1933 Act claims in covered class actions involving *non*-covered securities, too. In that respect, the "except" clause is broader in scope than the preclusion provision. But there is nothing anomalous about that. The 1934 Act reflects a similar approach, making federal court the exclusive venue for all 1934 Act claims (including those involving *non*-covered securities) while precluding only certain state-law class actions involving *covered* securities. *See* 15 U.S.C. §§ 78aa(a), 78bb(f)(1). Moreover, the Reform Act's class-action-specific protections apply to all 1933 Act class actions—whether involving covered securities or not—so it makes sense that Congress would make the "except" clause similarly as broad. *See id.* § 77z-1(a)(1).

That Congress took a narrower approach with preclusion simply illustrates the deeper federalism concerns that preclusion raises. Preclusion prevents a state-law claim from being heard in any court whatsoever, affecting the federal-state balance more profoundly than requiring a federal claim to be heard in a federal forum. *See Levin* v. *Commerce Energy, Inc.*, 560 U.S. 413, 431 (2010) ("[T]he National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." (internal quotation marks omitted)). So Congress crafted a "targeted" bill, precluding only those state-law class actions of greatest federal concern—and no others. *House Hearing*, *supra*, at 12 (statement of Rep. Anna G. Eshoo, cosponsor and manager); *see also* 143 Cong. Rec. S10,477 (daily ed. Oct. 7, 1997) (statement of Sen. Dodd) ("This legislation has been carefully crafted only to affect those types of class actions that are appropriately heard on the Federal level.").

The preclusion provision and the "except" clause thus work together to "enact national standards for securities class action lawsuits involving nationally traded securities." Pub. L. No. 105-353, § 2(5), 112 Stat. at 3227. Only by reading the "except" clause to divest state courts of jurisdiction over 1933 Act covered class actions like respondents' is that aim accomplished.

4. Finally, construing the "except" clause to except 1933 Act claims in covered class actions from state-court jurisdiction serves a goal that this Court has "consistently underscored in interpreting jurisdictional statutes": "administrative simplicity." *Merrill*

Lynch, Pierce, Fenner & Smith Inc. v. *Manning*, 136 S. Ct. 1562, 1573, 1574 (2016) (internal quotation marks omitted). "Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010). "So courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case." *Id.*

Requiring 1933 Act claims in covered class actions to be heard in federal court would be just such a rule. Courts would be able to determine whether an action arising under the 1933 Act belongs in federal court on the basis of a single factor: whether it meets the definition of a "covered class action." 15 U.S.C. § 77p(f)(2). And whether it does so will usually be clear from the face of the complaint. Indeed, because the inquiry is so straightforward, the parties will often agree—as they do here—that the definition is satisfied. *See* Br. in Opp. 3. For this reason, too, the Court should hold that the "except" clause divests state courts of concurrent jurisdiction over 1933 Act claims in covered class actions, including respondents' suit in this case.

II. ALTERNATIVE INTERPRETATIONS OF SLUSA SHOULD BE REJECTED

A. Respondents' Interpretation Cannot Be Squared With SLUSA's Text, Structure, History, Or Purposes

Respondents read the "except" clause of Section 22(a)'s jurisdictional provision differently. In their view, the "except" clause does not divest state courts of jurisdiction over any 1933 Act actions. Rather,

respondents argue, the clause serves a different purpose: to "reflect" the fact that, in Section 16(b), "Congress precluded certain *state law* securities class actions outright." Br. in Opp. 1. That reading cannot be squared with the text, structure, history, or purposes of SLUSA.

1. a. To begin, Section 16(b)'s preclusion provision makes no sense as the basis for an exception to Section 22(a)'s jurisdictional provision. That is because Section 16(b) is not about jurisdiction at all. It is about an entirely separate concept: "preclusion." *Kircher*, 547 U.S. at 636. It provides that certain class actions based on state law may not "be *maintained*" in "any" court, "State or Federal." 15 U.S.C. § 77p(b) (emphasis added). So when a state or federal court confronts such an action, it must dismiss the action as "nonactionable"—that is, for failure to state a claim upon which relief can be granted, not for lack of jurisdiction. *Kircher*, 547 U.S. at 636 n.1.

Respondents do not deny that Section 16(b) is about preclusion, not jurisdiction. Yet they insist that Congress amended Section 22(a)'s jurisdictional provision to "reflect [Section 16(b)'s] limitation on state court claims." Br. in Opp. 1. But if that limitation has nothing to do with jurisdiction, then that amendment accomplished nothing: The jurisdiction of state courts would be precisely the same, even if the twelve words added by the amendment—the "except" clause—were stricken. That is "at odds with one of the most basic interpretive canons, that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley* v. *United States*, 556 U.S. 303, 314 (2009) (internal quotation marks and brackets omitted).

Indeed, if the text of the "except" clause means anything, it is that Congress "except[ed]" *some* category of 1933 Act claims from the concurrent "jurisdiction" of "State" courts. 15 U.S.C. § 77v(a); *see supra* pp. 15-16. The fundamental flaw of respondents' position is that it renders that category an empty set; on their reading, the "except" clause would not divest state courts of jurisdiction over *any* 1933 Act claims at all. Theirs would be an "except" clause that creates no "except[ion]," making nonsense of the statutory text.

b. Respondents nevertheless maintain that they have the better reading of the "except" clause in light of the text of a *different* statute, the 1934 Act. Br. in Opp. 17. That statute's jurisdictional provision states that federal courts "shall have *exclusive jurisdiction*" over "all" 1934 Act claims. 15 U.S.C. § 78aa(a) (emphasis added). And according to respondents, Congress would have used the same words in Section 22(a) if it had wished to make federal courts the exclusive venue for 1933 Act claims in covered class actions.

Respondents infer too much from Congress's decision not to use the words "exclusive jurisdiction." For one thing, making use of those words would have entailed a major rewrite of Section 22(a)'s jurisdictional provision when just a minor revision sufficed. That is because Congress did not wish to make federal courts the exclusive venue for *all* actions arising under the statute, as in the case of the 1934 Act. Rather, it wanted to make federal courts the exclusive venue for *covered class actions*, while preserving the concurrent jurisdiction of state courts over *all other* 1933 Act claims. Creating a jurisdictional "except[ion]" for "covered class actions" was

the simplest way to achieve that narrow aim. *Id.* § 77v(a).

For another thing, Congress sometimes uses different words in different contexts to say the same thing. One need look no further than Section 22(a) itself. There, Congress described 1933 Act claims in two different ways: in the first sentence, as claims "brought to enforce any liability or duty created by this subchapter"; and in the penultimate sentence, as claims "arising under this subchapter." *Id.* Yet those two phrases mean the same thing. *See Manning*, 136 S. Ct. at 1568 & n.3. There is thus nothing strange about Congress using different words to define courts' jurisdiction. And the "mere possibility" that Congress could have used different "phrasing cannot defeat the most natural reading" of the "except" clause. *Caraco Pharm. Labs., Ltd.* v. *Novo Nordisk A/S*, 566 U.S. 399, 416 (2012).

c. Respondents also observe that SLUSA's addition of the "except" clause to Section 22(a)'s jurisdictional provision appeared in a subsection of SLUSA captioned "Conforming amendments." Pub. L. No. 105-353, § 101(a)(3), 112 Stat. at 3230. In respondents' view, construing the "except" clause to divest state courts of jurisdiction over 1933 Act claims in covered class actions would give too much substance to something Congress labeled a "[c]onforming amendment[]." Br. in Opp. 20.

Respondents "place[] more weight on the 'Conforming Amendments' caption than it can bear." *Burgess* v. *United States*, 553 U.S. 124, 135 (2008). "Congress did not disavow any intent to make substantive changes" by applying that label. *Id.* Rather, the addition of the "except" clause was "conforming"

because it "harmonized" Section 22(a)'s jurisdictional provision with the rest of SLUSA's changes, *id.*—each one animated by the principle that plaintiffs should not be able to evade the Reform Act's protections by filing their class actions in state court. *See supra* pp. 16-20. Further, Congress devoted an entire title of SLUSA to what it called "clerical and technical amendments." Pub. L. No. 105-353, tit. III, § 301, 112 Stat. at 3235 (capitalization and boldface omitted). If Congress really meant the "except" clause to be nonsubstantive, it could have given it that label instead.

In any event, Congress's use of a particular label is no excuse to abandon "the usual tools of statutory construction." *United States* v. *R.L.C.*, 503 U.S. 291, 305 n.5 (1992) (plurality opinion). Here, "[t]reating the amendment[] as nonsubstantive would be inconsistent with [its] text." *Burgess*, 553 U.S. at 135. As explained above, the text of the "except" clause is most naturally read to "except" a category of cases ("covered class actions") from the "concurrent" "jurisdiction" of "State" courts. 15 U.S.C. § 77v(a); *see supra* pp. 15-16. A label cannot change that. *See R.L.C.*, 503 U.S. at 305 n.5 (plurality opinion) ("[A] statute is a statute, whatever its label."). The fact remains that respondents' reading of the "except" clause has no basis in the statutory text.

2. Respondents' reading fares no better when placed within the context of SLUSA's amendments as a whole. Recall the three categories of covered class actions discussed above: (1) state-law covered class actions, (2) mixed covered class actions, and (3) 1933 Act covered class actions. *See supra* pp. 16-20. SLUSA's addition of a preclusion provision addresses the first category, and its amendment of

the anti-removal provision addresses the second, preventing state-law and mixed covered class actions from being used to evade the Reform Act's protections. SLUSA's addition of the "except" clause to the jurisdictional provision was thus meant to address the third category, preventing 1933 Act covered class actions from becoming vehicles of abuse as well.

But under respondents' reading, SLUSA did not address the third category at all. Rather, Congress was content to leave suits like this one, alleging only 1933 Act claims, mired in state court, where the Reform Act's provisions specific to class actions do not apply. Thus, on respondents' reading, SLUSA carefully closed two of the Reform Act's loopholes—for state-law and mixed covered class actions—but left a third wide open. That is hardly the "symmetrical and coherent regulatory scheme" that Congress presumably set out to create. *Gustafson*, 513 U.S. at 569.

3. Still, respondents insist that their interpretation of the "except" clause better reflects "Congress's purpose in enacting SLUSA." Br. in Opp. 17. Quoting from SLUSA's first line, *id.*, respondents assert that Congress had a singular "purpose": "to limit the conduct of securities class actions under *State law*." Pub. L. No. 105-353, 112 Stat. at 3227 (emphasis added). That was certainly *a* purpose of the legislation, but it was not the *only* one. Indeed, respondents cut off the quote too soon. The rest of the line continues: "*and for other purposes*." *Id.* (emphasis added).

Those "other purposes" reveal that Congress was concerned about more than "securities class actions under *State law*." *Id.* (emphasis added). As dis-

cussed above, Congress was concerned about securities class actions alleging 1933 Act claims, too. *See supra* pp. 20-30. Congress feared that an increasing number of such 1933 Act claims were being filed in state, rather than federal, court. *See supra* pp. 21-22. And Congress sought to stem that shift by "mak[ing] Federal court the exclusive venue for most securities class action lawsuits." H.R. Conf. Rep. No. 105-803, at 13. Respondents' reading of the "except" clause, however, would not advance that purpose. It would instead cause 1933 Act covered class actions to be stuck where plaintiffs file them—in state court.

Nor would respondents' reading fulfill another one of Congress's purposes: "to enact national standards for securities class action lawsuits involving nationally traded securities." Pub. L. No. 105-353, § 2(5), 112 Stat. at 3227. To be sure, precluding certain "*state law* securities claims" is a step toward that goal. Br. in Opp. 17. But as explained above, preclusion ensures only that such claims will be governed by uniform *substantive* standards; it does not guarantee that they will be governed by uniform *procedural* ones. *See supra* pp. 24-29. And Congress understood that procedure is as important as substance. *See supra* pp. 25-28. That is why it included so many procedural protections in the Reform Act. *See* 15 U.S.C. § 77z-1. Under respondents' interpretation of the "except" clause, however, plaintiffs could insist on bringing 1933 Act covered class actions in state court, subjecting defendants to "[d]isparate, and shifting, state litigation procedures." S. Rep. No. 105-182, at 3 (internal quotation marks omitted). Class actions involving nationally traded securities would thus not be governed by national standards after all.

4. Finally, respondents (Br. in Opp. 19-20) lean on the "presumption in favor of concurrent state court jurisdiction" in "cases arising under federal law." *Mims* v. *Arrow Fin. Servs., LLC*, 565 U.S. 368, 378 (2012) (internal quotation marks omitted). "Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly. Thus, the presumption * * * can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Tafflin* v. *Levitt*, 493 U.S. 455, 459-460 (1990) (internal quotation marks omitted).

Each of those markers is present here. The text of the "except" clause contains an explicit statutory directive "except[ing]" 1933 Act "covered class actions" from the "concurrent" "jurisdiction" of "State" courts. 15 U.S.C. § 77v(a). The unmistakable implication from SLUSA's legislative history is that Congress meant to "make[] Federal court the exclusive venue for most securities class action lawsuits." H.R. Conf. Rep. No. 105-803, at 13. And state-court jurisdiction is clearly incompatible with federal interests in preventing evasion of the Reform Act's protections and "protecting the integrity and efficient operation of the market for nationally traded securities." *Dabit*, 547 U.S. at 78. Accordingly, the presumption of concurrent jurisdiction has been overcome. Respondents' interpretation of the "except" clause should be rejected.

B. Though Better Than Respondents', The United States' Interpretation Is Still Not The Best

1. Like respondents, the United States contends that SLUSA did not divest state courts of jurisdiction over 1933 Act covered class actions such as this one. U.S. Cert. Br. 6. But unlike respondents, the United States maintains that defendants in such actions should have "access to a federal forum." *Id.* at 13. According to the United States, the "statutory mechanism for ensuring such access" is removal. *Id.* The United States construes Section 16(c), which SLUSA added, as authorizing the removal of not just *state-law* covered class actions described in Section 16(b), but also *1933 Act* covered class actions that meet the same description—namely, that allege a particular type of wrongdoing in connection with a covered security. *Id.* at 13-14. And in the United States' view, Section 22(a)'s anti-removal provision does not bar the removal of such 1933 Act actions because SLUSA created an "[e]xcept[ion]" to that provision for cases removable under Section 16(c). *Id.* at 13. The upshot is that 1933 Act suits like respondents' can be removed to federal court.

The position of the United States is certainly more faithful to the statutory scheme than that of respondents. To its credit, the United States recognizes that "the efficacy of [the Reform Act's] requirements depends on defendants' access to a federal forum." *Id.* It insists that SLUSA should be construed to "provide[] appropriate protection against the use of state-court lawsuits to circumvent [the Reform Act's] safeguards." *Id.* at 6. And it proposes an interpretation that would allow at least some

1933 Act covered class actions filed in state court to enjoy the protection of those safeguards through removal. *Id.* at 13-14. Respondents, by contrast, urge an interpretation that would keep those actions in state court, where most of the Reform Act's protections, including all those specific to class actions, do not apply. Br. in Opp. 16-22. If adopted, respondents' position would thus do far more harm to the statutory scheme than the United States'.

2. But while the United States' position is an improvement over respondents', it still does not reflect the best reading of the statute. The problem lies in the United States' reading of the "except" clause. The United States resists reading that clause to do what it says it does: "except" a category of 1933 Act actions ("covered class actions") from the "concurrent" "jurisdiction" of "State" courts. 15 U.S.C. § 77v(a). Instead, the United States offers two alternative readings, each premised on the same mistakes.

First, the United States proposes reading the "except" clause as "mak[ing] clear" that "state courts may not entertain any state-law claims barred by Section [16(b)]" in "hybrid class actions that contain both 1933 Act claims and state-law claims within the scope of Section [16(b)]." U.S. Cert. Br. 11-12. That reading, however, rests on a faulty premise: that Section 16(b) itself is a "jurisdictional" provision, which divests state courts of jurisdiction over certain state-law claims. *Id.* at 6; *see also id.* at 9 (referring to "SLUSA's divestiture of state-court jurisdiction * * * with respect to state-law claims"). In fact, as explained above, Section 16(b) concerns "preclusion," not jurisdiction, so it has no bearing on the concurrent jurisdiction of state courts at all. *Kircher*, 547

U.S. at 636; *see also id.* at 646 ("[A] defendant can elect to leave a case where the plaintiff filed it and trust the state court (an equally competent body) to make the preclusion determination." (citation omitted)); *supra* pp. 32-33.

But even assuming, for the sake of argument, that Section 16(b) were a jurisdictional provision, its effect would not be limited to "*state* courts," as the United States suggests. U.S. Cert. Br. 12 (emphasis added). After all, Section 16(b) says that certain state-law claims may not "be maintained in any State *or Federal* court." 15 U.S.C. § 77p(b) (emphasis added); *see also* U.S. Cert. Br. 7 (acknowledging that Section 16(b) "precludes both state and federal courts from hearing the specified state-law class actions"). That renders the United States' proposed reading even more implausible. For if Congress were really intent on "mak[ing] clear" the supposed jurisdictional implications of Section 16(b), U.S. Cert. Br. 12, it would not have written an "except" clause that applied only to the jurisdiction of *state* courts; it would have written an "except" clause that applied to the jurisdiction of *federal* courts, too. Indeed, Congress could have easily done so, simply by placing the "except" clause at the very beginning or the very end of Section 22(a)'s first sentence. The fact that Congress did not do so just shows that the United States' reading cannot be right.

Second, the United States suggests that "Congress may have added the 'except' clause to Section [22(a)] in a more general excess of caution, as a way of ensuring that nothing in the 1933 Act's general jurisdictional provision would be taken to supersede SLUSA's limits on state-court jurisdiction." *Id.* But this reading, too, rests on the erroneous premise that

Section 16(b) imposes a "jurisdiction[al]" limit. *Id.* And it, too, errs by ignoring that any jurisdictional limit imposed by Section 16(b) would necessarily apply not just to "*state*" courts, but to *federal* courts as well. *Id.* (emphasis added). Thus, if Section 16(b) really did impose jurisdictional limits, and if Congress really had wanted to ensure that nothing in Section 22(a) would be "taken to supersede" those limits, *id.*, Congress would not have put the "except" clause where it did, in a place where it modifies only the jurisdiction of *state* courts. Both of the United States' proposed readings of the "except" clause thus suffer from the same flaws.

3. Also flawed are the United States' reasons for *not* construing the "except" clause as divesting state courts of jurisdiction over 1933 Act claims in covered class actions. According to the United States, that reading is one that the "language will not bear." *Id.* at 9. That is because, the United States says, "nothing in Section [16]" "even arguably 'provide[s]' an exception to the general rule of concurrent jurisdiction." *Id.* at 8 (quoting 15 U.S.C. § 77v(a)).

But the United States assumes that what Section 16 must "provide[]" is an *exception*. It is the "except" clause itself, though, that provides the exception. It is the "except" clause itself, in other words, that divests state courts of jurisdiction over some category of 1933 Act actions. What Section 16 must "provide[]" is a *definition*, or else that category would go undefined. *See supra* pp. 15-16. And Section 16 does in fact "provide[]" a definition of a "covered class action," the term the "except" clause uses. 15 U.S.C. § 77p(f)(2). Construing the "except" clause to divest state courts of jurisdiction over 1933 Act claims in covered class actions is thus a perfectly natural way

to read the text—and certainly more natural than construing the "except" clause as not excepting *any* 1933 Act claims from state-court jurisdiction at all. Indeed, given the United States' willingness to construe the "[e]xcept[ion]" to the *anti-removal* provision as encompassing certain 1933 Act claims, *see supra* p. 39, there is no reason the United States should be unwilling to construe the "except[ion]" to the *jurisdictional* provision as encompassing *at least* those same 1933 Act claims, including respondents' claims in this case.

Finally, the United States observes that SLUSA's preclusive effect with respect to state-law claims extends only to covered class actions alleging particular types of wrongdoing involving covered securities. U.S. Cert. Br. 9-10; *see* 15 U.S.C. § 77p(b). According to the United States, there is "no evident reason that Congress would have wished SLUSA's divestiture of state-court jurisdiction to sweep more broadly" so as to encompass *all* covered class actions under the 1933 Act. U.S. Cert. Br. 9.

Actually, there is no evident reason that Congress would have wished the scope of the preclusion provision and the scope of the "except" clause to be *the same*. After all, preclusion and jurisdiction are two different things. And as explained above, it is perfectly reasonable that Congress would tread more lightly in precluding claims based on state law than in requiring a federal forum for claims arising under federal law. *See supra* p. 30. Indeed, given that under the 1934 Act the divestiture of state-court jurisdiction similarly sweeps more broadly than the preclusion of state-law claims, *see* 15 U.S.C. §§ 78aa(a), 78bb(f)(1), the structure of the 1933 Act should hardly be surprising. *See supra* p. 29. In any

event, if the United States thinks Cyan reads the "except" clause too broadly, there is a simple alternative: It could construe that clause as limited to the same 1933 Act claims—alleging particular types of wrongdoing in connection with covered securities—which it says can be removed to federal court under Section 16(c) and the "[e]xcept[ion]" to the anti-removal provision.

CONCLUSION

The judgment of the California Court of Appeal should be reversed.

Respectfully submitted,

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ADDENDUM

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STATUTORY PROVISIONS INVOLVED

Section 1 of the Securities Act of 1933 (1933 Act), 15 U.S.C. § 77a, provides:

Short title

This subchapter may be cited as the "Securities Act of 1933".

Section 16 of the 1933 Act, 15 U.S.C. § 77p, provides:

Additional remedies; limitation on remedies

(a) Remedies additional

Except as provided in subsection (b), the rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity.

(b) Class action limitations

No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—

(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or

(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

(c) Removal of covered class actions

Any covered class action brought in any State court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).

(d) Preservation of certain actions

(1) Actions under State law of State of incorporation

(A) Actions preserved

Notwithstanding subsection (b) or (c), a covered class action described in subparagraph (B) of this paragraph that is based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

(B) Permissible actions

A covered class action is described in this subparagraph if it involves—

(i) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

(ii) any recommendation, position, or other communication with re-

spect to the sale of securities of the issuer that—

(I) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

(II) concerns decisions of those equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

(2) State actions

(A) In general

Notwithstanding any other provision of this section, nothing in this section may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.

(B) "State pension plan" defined

For purposes of this paragraph, the term "State pension plan" means a pension plan established and maintained for its employees by the gov-

ernment of the State or political subdivision thereof, or by any agency or instrumentality thereof.

(3) Actions under contractual agreements between issuers and indenture trustees

Notwithstanding subsection (b) or (c), a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee may be maintained in a State or Federal court by a party to the agreement or a successor to such party.

(4) Remand of removed actions

In an action that has been removed from a State court pursuant to subsection (c), if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

(e) Preservation of State jurisdiction

The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

(f) Definitions

For purposes of this section, the following definitions shall apply:

(1) Affiliate of the issuer

The term "affiliate of the issuer" means a person that directly or indirectly, through

one or more intermediaries, controls or is controlled by or is under common control with, the issuer.

(2) Covered class action

(A) In general

The term "covered class action" means—

(i) any single lawsuit in which—

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which—

(I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

(B) Exception for derivative actions

Notwithstanding subparagraph (A), the term "covered class action" does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

(C) Counting of certain class members

For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

(D) Rule of construction

Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.

(3) Covered security

The term "covered security" means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 77r(b) of this title at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under this subchapter pursuant to rules issued by the Commission under section 77d(2) of this title.

Section 18 of the 1933 Act, 15 U.S.C. § 77r, provides in pertinent part:

Exemption from State regulation of securities offerings

* * *

(b) Covered securities

For purposes of this section, the following are covered securities:

(1) Exclusive Federal registration of nationally traded securities

A security is a covered security if such security is—

(A) listed, or authorized for listing, on the New York Stock Exchange or the American Stock Exchange, or listed, or authorized for listing, on the National Market System of the Nasdaq Stock

Market (or any successor to such entities);

(B) listed, or authorized for listing, on a national securities exchange (or tier or segment thereof) that has listing standards that the Commission determines by rule (on its own initiative or on the basis of a petition) are substantially similar to the listing standards applicable to securities described in subparagraph (A); or

(C) a security of the same issuer that is equal in seniority or that is a senior security to a security described in subparagraph (A) or (B).

(2) Exclusive Federal registration of investment companies

A security is a covered security if such security is a security issued by an investment company that is registered, or that has filed a registration statement, under the Investment Company Act of 1940.

* * *

Section 22 of the 1933 Act, 15 U.S.C. § 77v, provides:

Jurisdiction of offenses and suits

(a) Federal and State courts; venue; service of process; review; removal; costs

The district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this

subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, except as provided in section 77p of this title with respect to covered class actions, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. In any action or proceeding instituted by the Commission under this subchapter in a United States district court for any judicial district, a subpoena issued to compel the attendance of a witness or the production of documents or tangible things (or both) at a hearing or trial may be served at any place within the United States. Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil Procedure shall not apply to a subpoena issued under the preceding sentence. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of Title 28. Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts.

(b) Contumacy or refusal to obey subpena; contempt

In case of contumacy or refusal to obey a subpena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(c) Extraterritorial jurisdiction

The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of section 77q(a) of this title involving—

(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or

(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

Section 27 of the 1933 Act, 15 U.S.C. § 77z-1, provides:

Private securities litigation

(a) Private class actions

(1) In general

The provisions of this subsection shall apply to each private action arising under this subchapter that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure.

(2) Certification filed with complaint

(A) In general

Each plaintiff seeking to serve as a representative party on behalf of a class shall provide a sworn certification, which shall be personally signed by such plaintiff and filed with the complaint, that—

(i) states that the plaintiff has reviewed the complaint and authorized its filing;

(ii) states that the plaintiff did not purchase the security that is the subject of the complaint at the direction of plaintiff's counsel or in order to participate in any private action arising under this subchapter;

(iii) states that the plaintiff is willing to serve as a representative party on behalf of a class, including

providing testimony at deposition and trial, if necessary;

(iv) sets forth all of the transactions of the plaintiff in the security that is the subject of the complaint during the class period specified in the complaint;

(v) identifies any other action under this subchapter, filed during the 3-year period preceding the date on which the certification is signed by the plaintiff, in which the plaintiff has sought to serve, or served, as a representative party on behalf of a class; and

(vi) states that the plaintiff will not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery, except as ordered or approved by the court in accordance with paragraph (4).

(B) Nonwaiver of attorney-client privilege

The certification filed pursuant to subparagraph (A) shall not be construed to be a waiver of the attorney-client privilege.

(3) Appointment of lead plaintiff

(A) Early notice to class members

(i) In general

Not later than 20 days after the date on which the complaint is filed, the plaintiff or plaintiffs shall cause to be published, in a widely circulated national business-oriented publication or wire service, a notice advising members of the purported plaintiff class—

(I) of the pendency of the action, the claims asserted therein, and the purported class period; and

(II) that, not later than 60 days after the date on which the notice is published, any member of the purported class may move the court to serve as lead plaintiff of the purported class.

(ii) Multiple actions

If more than one action on behalf of a class asserting substantially the same claim or claims arising under this subchapter is filed, only the plaintiff or plaintiffs in the first filed action shall be required to cause notice to be published in accordance with clause (i).

(iii) Additional notices may be required under Federal Rules

Notice required under clause (i) shall be in addition to any notice required pursuant to the Federal Rules of Civil Procedure.

(B) Appointment of lead plaintiff

(i) In general

Not later than 90 days after the date on which a notice is published under subparagraph (A)(i), the court shall consider any motion made by a purported class member in response to the notice, including any motion by a class member who is not individually named as a plaintiff in the complaint or complaints, and shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members (hereafter in this paragraph referred to as the "most adequate plaintiff") in accordance with this subparagraph.

(ii) Consolidated actions

If more than one action on behalf of a class asserting substantially the same claim or claims arising under this subchapter has been

filed, and any party has sought to consolidate those actions for pretrial purposes or for trial, the court shall not make the determination required by clause (i) until after the decision on the motion to consolidate is rendered. As soon as practicable after such decision is rendered, the court shall appoint the most adequate plaintiff as lead plaintiff for the consolidated actions in accordance with this subparagraph.

(iii) Rebuttable presumption

(I) In general

Subject to subclause (II), for purposes of clause (i), the court shall adopt a presumption that the most adequate plaintiff in any private action arising under this subchapter is the person or group of persons that—

(aa) has either filed the complaint or made a motion in response to a notice under subparagraph (A)(i);

(bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and

(cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

(II) Rebuttal evidence

The presumption described in subclause (I) may be rebutted only upon proof by a member of the purported plaintiff class that the presumptively most adequate plaintiff—

(aa) will not fairly and adequately protect the interests of the class; or

(bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class.

(iv) Discovery

For purposes of this subparagraph, discovery relating to whether a member or members of the purported plaintiff class is the most adequate plaintiff may be conducted by a plaintiff only if the plaintiff first demonstrates a reasonable basis for a finding that the presumptively most adequate plaintiff is incapable of adequately representing the class.

(v) Selection of lead counsel

The most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class.

(vi) Restrictions on professional plaintiffs

Except as the court may otherwise permit, consistent with the purposes of this section, a person may be a lead plaintiff, or an officer, director, or fiduciary of a lead plaintiff, in no more than 5 securities class actions brought as plaintiff class actions pursuant to the Federal Rules of Civil Procedure during any 3-year period.

(4) Recovery by plaintiffs

The share of any final judgment or of any settlement that is awarded to a representative party serving on behalf of a class shall be equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class. Nothing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of the class.

(5) Restrictions on settlements under seal

The terms and provisions of any settlement agreement of a class action shall not be

filed under seal, except that on motion of any party to the settlement, the court may order filing under seal for those portions of a settlement agreement as to which good cause is shown for such filing under seal. For purposes of this paragraph, good cause shall exist only if publication of a term or provision of a settlement agreement would cause direct and substantial harm to any party.

(6) Restrictions on payment of attorneys' fees and expenses

Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.

(7) Disclosure of settlement terms to class members

Any proposed or final settlement agreement that is published or otherwise disseminated to the class shall include each of the following statements, along with a cover page summarizing the information contained in such statements:

(A) Statement of plaintiff recovery

The amount of the settlement proposed to be distributed to the parties to the action, determined in the aggregate and on an average per share basis.

(B) Statement of potential outcome of case

(i) Agreement on amount of damages

If the settling parties agree on the average amount of damages per share that would be recoverable if the plaintiff prevailed on each claim alleged under this subchapter, a statement concerning the average amount of such potential damages per share.

(ii) Disagreement on amount of damages

If the parties do not agree on the average amount of damages per share that would be recoverable if the plaintiff prevailed on each claim alleged under this subchapter, a statement from each settling party concerning the issue or issues on which the parties disagree.

(iii) Inadmissibility for certain purposes

A statement made in accordance with clause (i) or (ii) concerning the amount of damages shall not be admissible in any Federal or State judicial action or administrative proceeding, other than an action or proceeding arising out of such statement.

(C) Statement of attorneys' fees or costs sought

If any of the settling parties or their counsel intend to apply to the court for an award of attorneys' fees or costs from any fund established as part of the settlement, a statement indicating which parties or counsel intend to make such an application, the amount of fees and costs that will be sought (including the amount of such fees and costs determined on an average per share basis), and a brief explanation supporting the fees and costs sought.

(D) Identification of lawyers' representatives

The name, telephone number, and address of one or more representatives of counsel for the plaintiff class who will be reasonably available to answer questions from class members concerning any matter contained in any notice of settlement published or otherwise disseminated to the class.

(E) Reasons for settlement

A brief statement explaining the reasons why the parties are proposing the settlement.

(F) Other information

Such other information as may be required by the court.

(8) Attorney conflict of interest

If a plaintiff class is represented by an attorney who directly owns or otherwise has a beneficial interest in the securities that are the subject of the litigation, the court shall make a determination of whether such ownership or other interest constitutes a conflict of interest sufficient to disqualify the attorney from representing the plaintiff class.

(b) Stay of discovery; preservation of evidence

(1) In general

In any private action arising under this subchapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds, upon the motion of any party, that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

(2) Preservation of evidence

During the pendency of any stay of discovery pursuant to this subsection, unless otherwise ordered by the court, any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for produc-

tion of documents from an opposing party under the Federal Rules of Civil Procedure.

(3) Sanction for willful violation

A party aggrieved by the willful failure of an opposing party to comply with paragraph (2) may apply to the court for an order awarding appropriate sanctions.

(4) Circumvention of stay of discovery

Upon a proper showing, a court may stay discovery proceedings in any private action in a State court as necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery pursuant to this subsection.

(c) Sanctions for abusive litigation

(1) Mandatory review by court

In any private action arising under this subchapter, upon final adjudication of the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion.

(2) Mandatory sanctions

If the court makes a finding under paragraph (1) that a party or attorney violated any requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion, the court shall impose sanc-

tions on such party or attorney in accordance with Rule 11 of the Federal Rules of Civil Procedure. Prior to making a finding that any party or attorney has violated Rule 11 of the Federal Rules of Civil Procedure, the court shall give such party or attorney notice and an opportunity to respond.

(3) Presumption in favor of attorneys' fees and costs

(A) In general

Subject to subparagraphs (B) and (C), for purposes of paragraph (2), the court shall adopt a presumption that the appropriate sanction—

(i) for failure of any responsive pleading or dispositive motion to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation; and

(ii) for substantial failure of any complaint to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred in the action.

(B) Rebuttal evidence

The presumption described in subparagraph (A) may be rebutted only upon proof by the party or attorney against whom sanctions are to be imposed that—

(i) the award of attorneys' fees and other expenses will impose an unreasonable burden on that party or attorney and would be unjust, and the failure to make such an award would not impose a greater burden on the party in whose favor sanctions are to be imposed; or

(ii) the violation of Rule 11(b) of the Federal Rules of Civil Procedure was de minimis.

(C) Sanctions

If the party or attorney against whom sanctions are to be imposed meets its burden under subparagraph (B), the court shall award the sanctions that the court deems appropriate pursuant to Rule 11 of the Federal Rules of Civil Procedure.

(d) Defendant's right to written interrogatories

In any private action arising under this subchapter in which the plaintiff may recover money damages only on proof that a defendant acted with a particular state of mind, the court shall, when requested by a defendant, submit to the

jury a written interrogatory on the issue of each such defendant's state of mind at the time the alleged violation occurred.

RECORD AND BRIEFS

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No. 15-1439

IN THE

Supreme Court of the United States

CYAN, INC. *et al.*,

Petitioner,

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND *et al.*,

Respondents.

On Writ of Certiorari
to the Court of Appeal of the State of California,
First Appellate District

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BRIEF FOR RESPONDENTS

Respondents Beaver County Employees Retirement Fund et al. respectfully request that this Court affirm the decision below.

STATEMENT OF THE CASE

Petitioners are Cyan, Inc., a computer hardware and software company, as well as some of its officers and directors. Respondents are three pension funds and an individual who bought shares in Cyan's initial public offering.

On behalf of a class of investors, respondents sued petitioners under the Securities Act of 1933 (Securities Act), ch. 38, 48 Stat. 74, *codified at* 15 U.S.C. §§ 77a *et seq*. The precise factual allegations do not matter for purposes of the Question Presented in this Court. Broadly, respondents allege that Cyan's offering documents misrepresented the company's customer base and likely future sales. J.A. 19-20, 22-24. The truth later became apparent, causing the stock to lose more than half its value. J.A. 27. Respondents do not allege that petitioners' misstatements were fraudulent.

The important points for present purposes are that respondents brought a class action suit in California state court, asserting only claims under the uniform standards established by the Securities Act. *See* J.A. 13, 30-33. Petitioners moved for judgment on the pleadings. They argue that the Securities Litigation Uniform Standards Act of 1998 (SLUSA), Pub. L. No. 105-353, 112 Stat. 3227, eliminated state courts' jurisdiction over such larger class actions that assert claims only under the Securities Act.

Congress enacted SLUSA to prevent evasion of the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737, which imposed restrictions on federal securities class action suits. *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006). The PSLRA implemented certain procedural reforms in federal courts (*e.g.*, a requirement to appoint a lead plaintiff), and certain other substantive changes (*e.g.*, the creation of a safe harbor for forward-looking statements) that apply in every private securities action, regardless of forum. *See, e.g.*, 15 U.S.C. § 77z-2. It also imposed additional restrictions on suits brought under the Securities Exchange Act of 1934 (Exchange Act), 48 Stat. 881, including heightened pleading standards. *See* 15 U.S.C. § 78u-4(b)(1), (2).

In the wake of the PSLRA, some plaintiffs—like respondents here—continued to seek relief under federal law, as amended by the PSLRA. Some other plaintiffs, however, sought to avoid the PSLRA's restrictions by pleading their claims under state, rather than federal, law. In particular, certain securities fraud suits that previously would have been litigated under the Exchange Act in the federal courts—which have "exclusive jurisdiction" over such actions, 15 U.S.C. § 78aa(a)—were instead brought in state court under parallel provisions of state law. Congress recognized that such actions asserting violations of state law with respect to nationally traded securities had been exceedingly rare before the PSLRA. *See Dabit*, 547 U.S. at 82.

Congress responded by enacting SLUSA. SLUSA's "core provision," *id.*—Section 77p—has two

operative subsections, both targeted at this specific evasion of the PSLRA:

> Subsection (b) forbids any class action with at least 50 plaintiffs (a "covered class action") that includes a state law claim of misstatements or fraud in connection with the purchase or sale of a security traded on a national exchange (a "covered security").
>
> Subsection (c) provides that a covered class action in state court that includes a state law claim specified by subsection (b) may be removed to federal court, where it will be subject to subsection (b).

See 15 U.S.C. § 77p(b), (c); *see also id.* § 78bb (parallel amendment to the Exchange Act discussed in *Dabit*, which is substantively identical); *infra* at 1a-6a (reproducing Section 77p in full). Several provisions narrow Section 77p to preserve the power of state courts to decide various securities class actions and the authority of state officials.[1]

Section 77p applies to any (non-exempt) covered class action that includes a state law claim prohibited by subsection (b). That prohibition applies as well when the suit asserts both a state law claim and a federal claim under the Securities Act. The parties call such a combined action a "mixed" case. *E.g.*, Pet. Br. 17.

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[1] *See* § 77p(b)(2) (excluding smaller class actions and litigation over securities not traded on national exchanges), (d)(1) (excluding suits that are based on the law of the state of the defendant's incorporation), (d)(2) (excluding actions by state entities), (d)(3) (excluding actions to enforce an agreement with an indenture trustee), (f)(2)(B) (excluding derivative actions).

Petitioners accept that Section 77p does not preclude respondents' complaint, because respondents do not assert a claim under state law. Nor do petitioners contend that respondents' suit otherwise directly implicates Congress's concerns with efforts to evade the PSLRA's restrictions on federal class action litigation.

Petitioners instead rely on the Securities Act's jurisdictional provision—Section 77v(a)—which SLUSA modified in "conforming amendments." SLUSA § 101 (capitalization altered). Section 77v(a) states in relevant part, with the language added by SLUSA emphasized and with ellipses omitted for clarity:

> The district courts shall have jurisdiction, concurrent with State courts, except as provided in section 77p of this title with respect to covered class actions, of actions to enforce any liability created by this subchapter. Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.

15 U.S.C. § 77v(a); *see also infra* at 7a-8a (reproducing Section 77v(a) in full).

Petitioners argue that these amendments eliminate state courts' jurisdiction over all covered class actions that assert only claims under the Securities Act. *See* Pet. Br. 19. As discussed, however, the cross-referenced "section 77p" does not actually regulate suits brought exclusively under the Securities Act (or, for that matter, any federal law).

Petitioners argue that, notwithstanding the statutory text, their interpretation is nonetheless sound if one reads Section 77v(a)'s reference to "section 77p" to incorporate just one of Section 77p's sub-sub-provisions: Section 77p(f)(2), which "[f]or purposes of" Section 77p defines a "covered class action" as a suit on behalf of 50 or more plaintiffs. 15 U.S.C. § 77p(f)(2). Petitioners thus construe the phrase "except as provided in section 77p of this title with respect to covered class actions" to mean "except with respect to covered class actions as defined in section 77p(f)(2) of this title." On that reading, because respondents' suit is a covered class action, SLUSA strips the state courts of concurrent jurisdiction to hear it.

By contrast, respondents read the "conforming amendments" to Section 77v(a) to harmonize that provision with Section 77p's limitation on state courts' power to hear cases. Thus, Section 77v(a) strips state courts of jurisdiction over mixed cases—*i.e.*, covered class actions that simultaneously are "brought to enforce any liability or duty under" the Securities Act, 15 U.S.C. § 77v(a), and also are precluded by Section 77p because they advance a prohibited state law claim. Because respondents' action is not in any respect covered by Section 77p, that section does not "provide" any exception for the state courts' jurisdiction over it.

The overwhelming majority of federal and state courts agree with respondents that state courts have jurisdiction over covered class actions that assert claims only under the Securities Act. *See* BIO 12-13 n.3 (collecting cases). So did the Superior Court in this case, which denied petitioners' motion for judgment on the pleadings. Pet. App. 1a, 6a. The California Court

of Appeal and Supreme Court of California both denied interlocutory review. *Id.* 15a-16a. This Court called for the views of the Solicitor General, who agreed with respondents' reading but urged the Court to hear the case because some trial courts had issued conflicting rulings and the issue could evade appellate review. CVSG Br. 6. The Court granted certiorari. 137 S. Ct. 2325 (2017).

SUMMARY OF ARGUMENT

The state courts correctly concluded that they have jurisdiction over respondents' suit, which asserts only claims under the Securities Act. State courts have had concurrent jurisdiction to decide such cases since the statute was enacted almost 85 years ago in the wake of the country's greatest financial catastrophes. Nothing Congress did in the PSLRA or in SLUSA altered that well-settled understanding—let alone with sufficient clarity to strip state courts of jurisdiction to hear every single covered class action under the Securities Act.

SLUSA's conforming amendments to Section 77v(a)'s jurisdictional provision serve an important but narrow function: they abridge state court jurisdiction over "mixed" cases—*i.e.*, covered class action lawsuits asserting claims that are prohibited by Section 77p together with a claim under the Securities Act. The amendments thereby prevent plaintiffs from circumventing Section 77p by tacking Securities Act claims onto their prohibited state law claims to avoid dismissal.

That interpretation of the statute is the only one supported by the text of Section 77v(a), which provides that state courts shall have concurrent jurisdiction

over Securities Act cases, "except as provided in section 77p of this title with respect to covered class actions." 15 U.S.C. § 77v(a). Congress used the word "provided," meaning that the relevant limitation will be supplied by the operative provisions of Section 77p. This usage accords with the ordinary meaning of "provided," and with the way it is commonly used in the U.S. Code. Significantly, Congress used "provided" instead of "defined," which would signal the intent only to incorporate a definition of "covered class actions."

Congress also cross-referenced "section 77p of this title" in its entirety. It did not single out the sub-sub-section that petitioners argue was incorporated alone—*i.e.*, the definition of a "covered class action" in Section 77p(f)(2). A reference to Section 77p most naturally refers to what this Court has described as its "core provision," *i.e.*, the substantive limitation on covered class actions—as informed, of course, by the exclusions and definitions also located in Section 77p.

Respondents' interpretation is also the only one that truly harmonizes Section 77v(a) with Section 77p. Under respondents' interpretation, the conforming amendments to Section 77v(a) serve as a useful adjunct to Section 77p's core provision: they prevent Section 77v(a)'s grant of jurisdiction and removal bar from creating an end run around Section 77p. And they incorporate all of the operative provisions and limitations that Congress carefully incorporated into Section 77p.

Petitioners' interpretation, on the other hand, holds that Section 77v(a)'s amendments borrow a definition from Section 77p and ignore the rest of it. According to petitioners, Section 77v(a) then goes on

to target an entirely different set of cases than Section 77p: while SLUSA's core provision targets *only* state law cases, Section 77v(a)'s jurisdictional provision targets *only* covered class actions under the Securities Act. It does so whether those cases involve "covered securities" or not, and whether they allege fraud or deception or not. Petitioners' interpretation also reads the statute to shift cases from state to federal court, whereas Section 77p mandates the dismissal of the suits it targets.

That is not the way to harmonize two statutory provisions. Indeed, it makes no sense for a conforming amendment—designed to make Section 77v(a) conform to Section 77p—to instead implement an entirely different agenda.

For much the same reason, respondents' interpretation is the only one that reflects SLUSA's purpose. This Court has examined SLUSA repeatedly, and each time recognized that the statute was carefully drawn to target the most troublesome state law cases while simultaneously preserving the power of state courts and governments to address other cases—including cases that do not involve covered securities. Respondents' reading serves that purpose by making sure that SLUSA's core prohibition remains effective—even if a plaintiff in a mixed covered class action also raises a claim under the Securities Act. Petitioners' interpretation, by contrast, serves an entirely different purpose—of shunting Securities Act claims into federal court—that petitioners simply invented. Indeed, none of the snippets of legislative history petitioners cite even suggest that Congress was interested in moving *all* covered class actions under the Securities Act (even

those that do not involve a covered security, or allege the sort of misconduct described in Section 77p) into federal court; to the contrary, the most authoritative sources of legislative history are explicit that SLUSA's purpose was to bar claims under state law alleging falsehoods or fraud, and that it was not intended to affect cases that do not involve nationally traded securities.

Finally, the Solicitor General's theory, advanced at the certiorari stage, that SLUSA authorizes the removal of cases like respondents', is also incorrect. The plain text of SLUSA's removal provision only applies to covered class actions involving a covered security "as set forth in subsection (b)." 15 U.S.C. § 77p(c). Subsection (b), in turn, applies only to covered class actions "based upon the statutory or common law of any State or subdivision thereof," which allege falsehoods or fraud. 15 U.S.C. § 77p(b). The Solicitor General inexplicably argues that the Court can simply ignore the quoted language limiting SLUSA to cases based on state law. That simply is not how statutory interpretation works. Moreover, this Court rejected precisely that argument in *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 643 (2006), in which it adopted the "straightforward reading" that "removal and jurisdiction to deal with removed cases is limited to those precluded by the terms of subsection (b)." The Solicitor General's efforts to distinguish that precedent are unavailing.

For these reasons, the judgment of the California Court of Appeal should be affirmed.

ARGUMENT

Pursuant to SLUSA's "conforming amendments" to Section 77v(a), state courts have concurrent jurisdiction over a lawsuit asserting a Securities Act claim, "except as provided in section 77p of this title with respect to covered class actions." 15 U.S.C. § 77v(a). Respondents read the amendment naturally to restrict state courts' jurisdiction over the covered class actions that are proscribed by Section 77p—*i.e.*, mixed cases that assert prohibited state law claims in connection with the purchase or sale of covered securities, combined with a Securities Act claim.

By contrast, petitioners unnaturally read the amendment to permit only federal courts, not state courts, to adjudicate all covered class actions that *only* assert claims under the Securities Act. They press that interpretation notwithstanding that Section 77p does not regulate those suits, that it does not reach all "covered class actions," and that it provides for the dismissal of the cases it covers rather than shifting them to be litigated in federal court.

Respondents' reading is much better. Even if both interpretations are possible, the tie-breaker is the rule of statutory construction that Congress makes substantial changes to settled law clearly, not obliquely and misleadingly.[2] That is especially true if

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[2] *See, e.g.*, *United States v. Cook*, 384 U.S. 257, 262 (1966) (rejecting a statutory interpretation that would significantly alter the scope of persons affected "without some specific indication that Congress had receded from the intention it clearly expressed"); *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957) ("it will not be inferred that Congress, in

Congress intends to change the federal-state balance by stripping state courts of their established jurisdiction over federal claims.[3] State courts have had concurrent jurisdiction over suits asserting claims exclusively under the Securities Act ever since Congress enacted the statute in 1933. *See* Pet. Br. 14. If Congress intended to depart from that tradition, which had been settled for more than six decades when SLUSA was enacted, it would have said so plainly.

I. SLUSA Does Not Strip State Courts Of Concurrent Jurisdiction Over Class Actions That Only Advance Claims Under The Securities Act.

SLUSA enacted the preclusion and removal provisions of Section 77p, together with "conforming

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revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed"); *Anderson v. Pac. Coast S.S. Co.*, 225 U.S. 187, 199 (1912) (same).

[3] *See, e.g.*, *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 378 (2012) ("The presumption of concurrent state-court jurisdiction . . . can be overcome 'by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.'") (quoting *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981)); *Am. Nat'l Red Cross v. S.G.*, 505 U.S. 247, 259 (1992) ("There is every reason to expect Congress to take great care in its use of explicit language when it wishes to confer exclusive jurisdiction, given our longstanding requirement to that effect."); *see also Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1573 (2016) (explaining that this Court's decisions "reflect a deeply felt and traditional reluctance . . . to expand the jurisdiction of federal courts through a broad reading of jurisdictional statutes," and explaining that this "reluctance . . . grows stronger" when "a statute . . . depriv[es] state courts of all ability to adjudicate certain claims").

amendments" to Section 77v(a). SLUSA § 101. Properly understood, the point of those amendments was to eliminate a potential conflict between Sections 77p and Section 77v(a). Section 77p, as explained above, prohibits courts from adjudicating certain covered class actions that are "based upon" the law of any state, and authorizes the removal of those actions from state court. 15 U.S.C. § 77p(b), (c). Section 77v(a), on the other hand, confirmed that state courts had concurrent jurisdiction over cases "brought to enforce any liability or duty created by" the Securities Act, and prohibited the removal of those cases from state courts of competent jurisdiction. 15 U.S.C. § 77v(a).

These two provisions would have been at war with each other if a plaintiff filed a "mixed" covered class action asserting claims that were based upon state law, and also claims under the Securities Act. Section 77p would have required preclusion and permitted removal of the action; Section 77v(a) would have expressly confirmed the state court's jurisdiction to hear the case and would have prohibited removal.

This scenario would have created at least the possibility that plaintiffs would have attempted to circumvent SLUSA by tacking Securities Act claims onto their prohibited state law class actions. Indeed, these mixed cases have been brought regularly,[4] and

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[4] *See, e.g., Ariail Drug Co., Inc. v. Recomm Int'l Display, Inc.*, 122 F.3d 930, 931 (11th Cir. 1997); *Shorty v. Top Rank of La.*, 876 F. Supp. 838, 839 (E.D. La. 1995); *Westinghouse Credit Corp. v. Thompson*, 987 F.2d 682, 683 (10th Cir. 1993); *Peoples Nat'l Bank v. Darling*, No. 91-1052-K, 1991 WL 45716, at *1 (D. Kan. Apr. 1, 1991); *West Virginia v. Morgan Stanley & Co., Inc.*, 747 F. Supp. 332, 333 (1990); *Emrich v. Touche Ross & Co.*, 846 F.2d 1190,

they could have become much more common if SLUSA did not clearly exclude them from the jurisdiction of the state courts and subject them to removal.

SLUSA prevented that circumvention by modifying Section 77v(a) using conforming amendments that harmonize the jurisdictional provision with Section 77p. The amendments narrow both the state courts' jurisdiction and the parallel removal bar by excluding cases that are prohibited by Section 77p.

This interpretation maps naturally onto the language Congress used. Congress excluded mixed covered class actions by providing that state courts have jurisdiction over Securities Act cases "except as provided in section 77p of this title with respect to covered class actions." 15 U.S.C. § 77v(a). That is common statutory phrasing. Congress regularly uses language akin to "except as provided in [*a statutory section*] with respect to [*a specified subject matter*]." Those statutes consistently incorporate a substantive limitation from the cross-referenced statutory provision.[5]

1193 (9th Cir. 1988); *Abing v. Paine, Webber, Jackson & Curtis*, 538 F. Supp. 1193, 1195 (D. Minn. 1982); *Milton R. Barrie Co., Inc. v. Levine*, 390 F. Supp. 475, 477 (S.D.N.Y. 1975); *Pinto v. Maremont Corp.*, 326 F. Supp. 165, 166 (S.D.N.Y. 1971); *Korber v. Lehman*, 221 F. Supp. 358, 359 (S.D.N.Y. 1963).

[5] *See, e.g.*, 15 U.S.C. § 78c-1(3) ("Except as provided in section 78p(a) of this title with respect to reporting requirements, the Commission is prohibited from" regulating swap agreements.); 23 U.S.C. § 301 ("Except as provided in section 129 of this title with respect to certain toll bridges and toll tunnels," highways shall be free of tolls.); 26 U.S.C. § 6807 (providing that

Section 77v(a) and those other statutes use the most commonly accepted definition of "provided": "supplied."[6] Here, the amendment to Section 77v(a) directs the reader to Section 77p, which will supply a self-operative limit on state courts' ability to adjudicate Securities Act suits. Congress incorporated *all* of Section 77p because several parts of Section 77p are relevant, including subsection (b)'s prohibition on certain covered class actions, the statute's various exclusions that preserve state court jurisdiction in some cases, and the definitions of the statutory terms. *See supra* at 3 n.1.

Respondents' suit is not precluded by Section 77p, because it does not assert a claim under state law. It therefore is subject to the state courts' jurisdiction under Section 77v(a).

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seized goods will receive required brands, stamps, or marks prior to sale, "except as provided in section 5688 with respect to distilled spirits"); 36 U.S.C. § 220521(a) (providing that the United States Olympic Committee "may recognize only one national governing body for each sport for which an application is made and approved, except as provided in section 220522(b) with respect to a paralympic sports organization"); 42 U.S.C. § 10194(c) (providing that the Secretary of Energy's research activities relating to the identification of nuclear waste sites are subject to certain restrictions "[e]xcept as provided in section 10198 of this title with respect to a test and evaluation facility"). In all of these provisions, the referenced sections do not define the respective terms of art but instead lay out self-contained substantive requirements.

[6] *See, e.g.*, Merriam-Webster's Collegiate Dictionary (10th ed. 2001) (defining "provide" as "to supply something for sustenance or support"); Webster's II: New College Dictionary (1995) (defining "provide" as "To furnish: supply").

II. There Is No Merit To Petitioners' Interpretation Of Section 77v(a).

A. Petitioners' Reading Cannot Be Reconciled With The Statutory Text.

Petitioners' contrary reading of Section 77v(a) is not supportable. They rely on the fact that one of Section 77p's several sub-sub-sections ((f)(2)) defines "covered class action" as a suit or group of suits with 50 or more plaintiffs. The definition does not require that the suit assert a state law claim involving a covered security.

Petitioners' reading requires substantially reordering the words of the amendment to Section 77v(a) and reading "provided" to mean "defined"—*i.e.*, that the language that follows ("in section 77p") explains the meaning of a term of art. But "defined" is not an accepted usage of "provide." Petitioners do not identify any dictionary recognizing it. Nor do they identify any other statute using the phrase "as provided in" that way. When the securities laws intend to incorporate a definition they consistently use familiar formulations like "as defined in."[7] Moreover, petitioners' assertion that SLUSA incorporates this definition into Section 77v(a) also fails because SLUSA specifies that the definition of "covered class action" applies only "[f]or purposes of" Section 77p. *See* 15 U.S.C. § 77p(f).

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[7] *See, e.g.*, 15 U.S.C. § 77b-1(b)(1) (excluding from the definition of a "security" any "security-based swap agreement (as defined in section 78c(a)(78) of this title"); 15 U.S.C. §§ 77b(a)(15)(i), 77c(a)(2), 77d-1(a)(1)(B), 77r-1(a)(1)(C), 77s(e) (all calling out definitions in other statutory sections using the phrase "as defined in").

Petitioners also have no sound explanation for why Congress incorporated "section 77p" as a whole, if it actually intended to refer only to the isolated definition of "covered class action" in subsection 77p(f)(2). Petitioners' sole argument is that one feature of "section 77p" is that it includes "a definition of a 'covered class action.'" Pet. Br. 16. But that definition is ancillary to Section 77p as a whole. In referencing what Section 77p "provides," Congress is much, much more likely to have had in mind SLUSA's "core" operative provision: the bar to "covered class actions" that include a state law claim.

If Congress actually intended petitioners' reading, it would have used a common and clear formulation, such as: "except with respect to covered class actions as defined in section 77p(f)(2)." Or consistent with the Exchange Act, Congress would have granted federal courts "exclusive jurisdiction" over those suits. *See* 15 U.S.C. § 78aa(a).

Any remaining doubt is resolved against petitioners' reading by SLUSA's other "conforming amendment" to Section 77v(a), which narrowed the removal bar. That provision is particularly informative because there is a strong presumption that words have a consistent meaning when used multiple times in a statute. That presumption is at its apex when the words appear in close proximity and were adopted together.[8] As amended by SLUSA, that

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[8] *See, e.g., Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003) ("The interrelationship and close proximity of these provisions of the statute presents a classic case for application of the normal rule of statutory construction that identical words

provision states: "Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States." 15 U.S.C. § 77v(a).

Without a doubt, this provision uses "provided" to mean "supplied," because it incorporates the substantive limits on removal imposed by Section 77p(c). It does not incorporate a definition. The amendment furthermore references only a single subsection of Section 77p, just as Congress would have done if it intended the jurisdictional provision to incorporate only Section 77p(f)(2)'s definition of "covered class action." Petitioners identify no reason that Congress would have intended the same adjoining phrasing, adopted together, to have such a radically different meaning.

B. Petitioners' Interpretation Cannot Be Reconciled With Section 77p.

1. The parties agree that Congress amended Section 77v(a) to "harmonize" that provision with Section 77p. *See* Pet. Br. 35. But only respondents' reading does so. As discussed, properly understood, the amendment eliminates the state courts' jurisdiction, and permits removal, for "mixed cases" that combine a Securities Act claim that would otherwise be within the state courts' jurisdiction under Section 77v(a) with a claim prohibited by Section 77p. The amendment thus ensures that SLUSA fulfills its purpose of precluding *all* covered

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used in different parts of the same act are intended to have the same meaning.") (citations and quotations omitted); *Comm'r v. Lundy*, 516 U.S. 235, 250 (1996) (same).

class actions asserting a prohibited claim—*i.e.*, a state law claim alleging misstatements or fraud in connection with a nationally traded security.

Petitioners, by contrast, read the amendment to eliminate state court jurisdiction over covered class actions arising solely under the Securities Act. Pet. Br. 10. On that reading, the amendment to Section 77v(a) functions very differently than as a harmonious adjunct to Section 77p. It would apply only to federal law claims that Section 77p does not regulate at all. It also would apply to *all* covered class actions, whereas Section 77p is substantially narrower. And it would shift the cases in question to federal court, while Section 77p requires the dismissal of cases it covers.

Thus, according to petitioners, the amendment incorporates only the definition of "covered class action," while leaving all of the other limitations of Section 77p by the wayside. Petitioners concede that their interpretation of the statute would strip state courts of jurisdiction over cases that do not involve "covered securities" and do not include claims of misstatements or fraud in the purchase or sale of those securities. Pet. Br. 29; *see, e.g.*, 15 U.S.C. §§ 77e, 77*l*(a)(1) (Section 12 claim with respect to securities that are not registered and therefore are not "covered securities"). Petitioners would require all covered class actions asserting a Securities Act claim—many of which implicate neither national securities markets nor the types of claims that motivated Congress to enact SLUSA—to be brought in federal court.

Relatedly, petitioners also read the amendments to Section 77v(a) to perform a very different function than Section 77p. The latter extinguishes state law claims, consistent with Congress's goal to prohibit

state law actions that were intended to evade the PSLRA. Although subsection (c) provides for the removal of those cases from state to federal court, they are immediately subject to dismissal under subsection (b). The point of the prohibition is to require plaintiffs to plead their claims under federal law, which is exactly what respondents properly did here. By contrast, on petitioners' reading, the role of the amendment to Section 77v(a) is to shift Securities Act class actions from state to federal court, where they will be litigated on the merits.

That is a profound disharmony. It would have been bizarre and misleading for Congress to use the phrase "as provided in section 77p" to refer to a body of cases that is so different from those regulated by that provision, and to produce such a different result for those cases. Congress is especially unlikely to have used that language to identify lawsuits that assert exclusively federal law claims under the Securities Act, when those suits are not targeted—or even mentioned—by Section 77p *in any respect*.

2. Petitioners' counter-argument is that Congress wrote SLUSA to select three different kinds of covered class actions for three different kinds of treatment: state law claims of misstatements or fraud with respect to covered securities (precluded by Section 77p); pure Securities Act claims (excluded from state court jurisdiction by Section 77v(a)'s jurisdictional provision); and mixed cases that combine the two (removable to federal court under Section 77v(a)'s removal provision). *See* Pet. Br. 16-18. But that is just a description of the bizarre structure that petitioners' tortured reading would create, not something

Congress would actually have intended as it sought to harmonize the various provisions.

There specifically is no merit to petitioners' claim that SLUSA targets three distinct categories of cases. Sections 77v(a) and 77p contain three provisions with the *identical*—not distinct—scope: each reaches cases that advance a prohibited state law claim (including mixed cases that also advance other claims). Thus, the core prohibition of Section 77p(b) applies to mixed cases because it forbids any covered class action "based upon" state law, without regard to whether the lawsuit also includes a federal claim. A plaintiff obviously could not avoid preclusion by, for example, combining a state law claim in a single lawsuit with one under the Exchange Act. In turn, the removal provisions of Sections 77p(c) and 77v(a) incorporate and track the scope of Section 77p(b). 15 U.S.C. §§ 77p(c) (removal applies to cases "as set forth in subsection (b)"), 77v(a) (removal is limited "as provided in section 77p(c)"); *see generally Kircher v. Putnam Funds Tr.*, 547 U.S. 633 (2006).

There is no reason that Congress would have intended the sole remaining provision—the jurisdictional limitation in Section 77v(a)—to be an outlier addressing an entirely different class of cases. To the contrary, Section 77v(a)'s jurisdictional provision is obviously intended to reach the same cases as its removal provision. The point of those parallel amendments enacted by SLUSA is to ensure that if a state court fails to adhere to the limits on its jurisdiction imposed by the former, the defendant has access to a federal forum (which will dismiss the case) under the latter. *See Kircher*, 547 U.S. at 643-44 & n.12 (applying the same reasoning to the removal provision

of Section 77p(c)). But petitioners read the jurisdictional and removal provisions of Section 77v(a) to refer to entirely different sets of cases.

Petitioners' only answer is that because the removal provision is narrower, this anomaly is necessary to ensure that class actions asserting claims only under the Securities Act may not be filed in state court. Pet. Br. 18. But that just assumes petitioners' conclusion. The point of examining the statute's structure is to determine if Congress actually intended to exclude class actions that assert only a claim under the Securities Act. Petitioners thus miss—or hope to avoid—the point: *whatever* cases containing Securities Act claims that SLUSA subjected to removal—*viz.*, those precluded by Section 77p—are the same cases that it excluded from the state courts' jurisdiction. Those were mixed cases.

Petitioners also argue that only their reading treats suits under the Securities Act and the Exchange Act consistently because both would be litigated in federal court. Pet. Br. 33-34. But petitioners' reading does not even actually produce that result: it would move only larger "covered" class actions, not individual suits or smaller group actions, to federal court.

In any event, there is no substantial evidence that Congress enacted SLUSA to require that both Securities Act and Exchange Act suits be filed in federal court. Congress has always treated those two statutes differently: plaintiffs were always able to bring cases under the Securities Act in state court; cases under the Exchange Act have always been within the federal courts' exclusive jurisdiction. *See infra* at 8a (reproducing the text of 15 U.S.C. § 77v(a)

prior to SLUSA's amendment); 15 U.S.C. § 78aa(a). The difference may reflect Congress's judgment to require claims under the Exchange Act to be litigated in federal court because that statute extends liability to far more parties involved in vastly more transactions, as it encompasses misstatements in the open market. *See, e.g.*, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381 (1983) (explaining that Securities Act and Exchange Act "involve distinct causes of action and were intended to address different types of wrongdoing") ; *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 728-30, 752-53 (1975) (discussing at length the differences in purpose, scope, history, and underlying policy between the express remedies under the Securities Act and the implied remedy under § 10(b) of the Exchange Act); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 207-11 (1976) (same). If Congress had intended SLUSA to change that long-settled regime, it would naturally have amended the Securities Act to say so expressly, tracking the federal courts' "exclusive jurisdiction" over Exchange Act suits. *See* 15 U.S.C. § 78aa(a); *supra* at 11, 16.

3. Petitioners finally argue that Congress would not have mixed apples and oranges by expressing a limitation on state courts' "jurisdiction" (set out in Section 77v(a)) in terms of a non-jurisdictional "preclusion" of certain securities suits (taken from Section 77p). But petitioners simply have no authority for the proposition that it is improper for Congress to allow a substantive provision to define the scope of a jurisdictional one.

In fact, what Congress did in SLUSA is perfectly ordinary and sensible. As discussed, it specified that

the state courts' jurisdiction over Securities Act claims in Section 77v(a) does not include mixed cases that also assert the state law claims precluded by Section 77p. In drafting an appropriate amendment, Congress essentially *had* to refer both to a jurisdictional provision and a preclusion provision—or at least that was the most straightforward approach—because Section 77v(a) is written in terms of the former and Section 77p the latter. Petitioners' argument that Congress would never do so—but instead would have left the conflict between the two provisions in place simply because of the formalism that Section 77v(a) is expressed in "jurisdictional" terms—does not accurately capture how laws are actually written.

Again, Section 77v(a)'s removal provision is highly instructive. As petitioners recognize (Br. 17-18), that provision incorporates Section 77p(c), which then defines the scope of removal *jurisdiction* exclusively in terms of the *prohibition* of Section 77p(b). *See* 15 U.S.C. §§ 77v(a) (removal prohibited "[e]xcept as provided in section 77p(c)"), 77p(c) (removal permitted for a covered class action "involving a covered security, as set forth in subsection (b)").

On respondents' reading, Section 77v(a)'s jurisdictional provision operates the same way: it just incorporates Section 77p as a whole instead of Section 77p(c). There is no greater incongruity in that statutory cross-reference than there is in Section 77p(c)'s reference to Section 77p(b).

Moreover, the fact that Section 77v(a) incorporates Section 77p does not render the former provision any less "jurisdictional": it defines the state courts' jurisdiction by reference to the body of cases that are prohibited by Section 77p. In plain English,

the amendment provides that state courts have jurisdiction over any Securities Act suit not prohibited by SLUSA. There is nothing unnatural about that.

Finally, even if this argument is correct—and it is not—it does not help petitioners. The consequence of deciding that Section 77v(a) can only incorporate the "jurisdictional" parts of Section 77p would not be to read it to incorporate the definition of "covered class action," because the definition provision is not even arguably a jurisdictional provision. Instead, the logical reading would incorporate the central jurisdictional provision of Section 77p: subsection (c), which provides for the removal cases from state to federal court. On that reading, the state courts would have jurisdiction over mixed cases that were not subject to removal under "section 77p." This is not such a case, so it would remain within the state courts' jurisdiction.

The other alternative would be to conclude, as the Solicitor General suggested at the certiorari stage, that "nothing in Section 77p . . . even arguably 'provide[s]' an exception to the general rule of concurrent jurisdiction," and hold that the jurisdictional amendment is essentially a road to nowhere because limitations on state court jurisdiction require unusually clear language, and SLUSA does not contain any. CVSG Br. 8; *see also id.* at 11. In that case, too, the state courts would have jurisdiction over respondents' suit.

C. Petitioners Misstate SLUSA's Purpose.

Petitioners lean heavily on the claim that Congress enacted SLUSA to move all federal securities class action litigation to federal court. *See, e.g.*, Pet. Br. 11, 13, 18, 21-23. That is not accurate. In

three decisions, this Court has carefully studied SLUSA's text, structure, and history. Only respondents' reading is consistent with the Court's correct understanding of Congress's intent.

In *Merrill Lynch, Pierce, Fenner & Smith v. Dabit*, 547 U.S. 71 (2006), the Court explained that the PSLRA

> placed special burdens on plaintiffs seeking to bring federal securities fraud class actions. But the effort also had an unintended consequence: It prompted at least some members of the plaintiffs' bar to avoid the federal forum altogether. Rather than face the obstacles set in their path by the [PSLRA], plaintiffs and their representatives began bringing class actions under state law, often in state court. . . . To stem this "shif[t] from Federal to State courts" and "prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of" the [PSLRA], SLUSA § 2(2), (5), 112 Stat. 3227, Congress enacted SLUSA.

Dabit, 547 U.S. at 82. *Dabit* further noted that SLUSA was not drafted "cavalierly," but instead "carefully exempts from its operation" various class actions that remain within the jurisdiction of the state courts—provisions that "evince[] congressional sensitivity to state prerogatives in this field." *Id.* at 87.

In *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 636 (2006), the Court reaffirmed that Congress enacted SLUSA "[t]o block this bypass of the [PSLRA]" described by *Dabit*. Addressing the nature of Section

77p's prohibition, the Court explained that its "purpose" was "to preclude certain vexing state-law class actions," and that the statute "avails a defendant of a federal forum in contemplation not of further litigation over the merits of a claim brought in state court, but of termination of the proceedings altogether." *Id.* at 644 n.12. SLUSA thus does not express "any policy of having particular suits tried in a federal court." *Id.*

And in *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058 (2014), the Court rejected efforts to extend SLUSA's reach based on the claim that Congress broadly intended to shift securities class action litigation to federal court. The Court recognized that "the Act focuses upon transactions in covered securities, not upon transactions in uncovered securities," about which "the Act expresses no concern." *Id.* at 1066. The Court again stressed the "congressional care" taken to "purposefully maintain[] state legal authority," whereas "[a] broad interpretation of [SLUSA] works at cross-purposes with this state-oriented concern." *Id.* at 1068-69 (citation and quotations omitted). *See also Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2413 (2014) (reiterating that SLUSA was enacted "to prevent plaintiffs from circumventing [the PSLRA's] restrictions by bringing securities class actions under state law in state court").

Only respondents' reading is consistent with this Court's careful study of Congress's intent in enacting SLUSA. Respondents' interpretation tracks the statute's purpose to stop the use of state law securities claims to evade the PSLRA's restrictions. The "conforming amendments" to Section 77v(a) withdraw

state court jurisdiction over suits prohibited by Section 77p, while accounting for all of the limitations Congress carefully placed on SLUSA's scope in Section 77p itself.

By contrast, petitioners' reading does nothing to advance the statute's purpose, because it is completely untethered from the state law cases that motivated Congress to enact SLUSA. Petitioners argue that SLUSA was designed to prevent circumvention of the PSLRA, and that forcing all Securities Act cases into federal court furthers that purpose because the PSLRA's procedural requirements relating to class actions apply only in federal court. Pet. Br. 37. This argument ignores the fact that when Congress enacted the PSLRA itself, state courts had been adjudicating Securities Act cases for sixty years; indeed, their power to do so was explicitly recognized in Section 77v(a). Congress clearly knew this, which is why some of the PSLRA's reforms apply in state court too. *See, e.g.*, PSLRA § 102 (creating the safe harbor for forward-looking statements codified at 15 U.S.C. § 77z-2). Indeed, some are amendments to the substantive provisions of the Securities Act itself. *See, e.g.*, PSLRA §§ 103 (amending Section 20 of the Securities Act to prohibit attorney's fees paid from disgorgement funds), 105 (amending Section 12 of the Securities Act to create a loss-causation defense), 201 (amending Section 11 of the Securities Act to limit the liabilities of outside directors). But the PSLRA did not attempt to modify state courts' concurrent jurisdiction over Securities Act claims. And it did not attempt to force state courts to adopt different class action procedures—even though it found those procedural reforms appropriate for federal courts. In other words,

the PSLRA, which was Congress's principal effort to curb abusive securities litigation, allowed state courts to continue adjudicating Securities Act class actions under their own procedures. It cannot be circumvention of the PSLRA for state courts to continue doing precisely that.

Indeed, there simply is no evidence that Congress regarded state court adjudication of cases alleging only Securities Act claims to be a problem when it enacted SLUSA. In contrast with the uptick in state law securities fraud filings after the PSLRA, petitioners have not presented any comparable evidence that the enactment of the PSLRA spurred more Securities Act class actions in state court. The table of cases petitioners appended to the Petition for Writ of Certiorari, for example, listed a grand total of two cases filed between the enactment of the PSLRA (December 22, 1995) and SLUSA (November 3, 1998). *See* Pet. App. 31a. In their merits brief, petitioners do not identify any additional cases, nor any other evidence suggesting that a large number of Securities Act class actions migrated to state court after the PSLRA. This again belies their contention that Congress went out of its way in SLUSA—a statute designed to reinforce the PSLRA—to strip state courts of jurisdiction over such cases.

It makes sense that Congress was not particularly concerned about Securities Act cases. SLUSA's overarching goal is to ensure uniformity by forcing class action plaintiffs to eschew diverse state law causes of action and file claims relating to covered securities under federal law. Respondents—like every plaintiff that asserts only claims under the Securities Act—did just that. Because every covered class action

under the Securities Act is already governed by uniform federal substantive standards, and because there is no evidence that state courts were refusing to apply those standards faithfully, there was no reason for Congress to create exclusive federal jurisdiction over those cases.

Petitioners' claim that SLUSA broadly withdraws the state courts' jurisdiction also cannot be reconciled with this Court's recognition that Congress wrote the statute to preserve the authority of the states, including the state courts. Among other examples, SLUSA is carefully limited to suits involving "covered securities," because they are more consequential to the national economy and because those were traditionally filed in federal court prior to the PSLRA. "Foremost on Congress's mind were securities class action lawsuits involving nationally traded securities, known as 'covered securit[ies]' under the statute." Pet. Br. 24. But petitioners concede that their interpretation "divests state courts of jurisdiction over 1933 Act claims in covered class actions involving *non*-covered securities, too." *Id.* at 29.

Petitioners spend ten pages (Br. 20-30) attempting to recharacterize SLUSA's purpose, based almost exclusively on isolated snippets of legislative history. But this Court's decisions have already examined the legislative materials in detail and, as discussed, they support only respondents' interpretation. Manifestly, the legislative history does not provide an "unmistakable" indication of Congress's intent to adopt petitioners' atextual interpretation. *Mims*, 565 U.S. at 378; *see also Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 826 (1990) (unanimously finding no unmistakable evidence of

intent to oust the states even though "most legislators, judges, and administrators . . . expected that [Title VII of the Civil Right Act] would be processed exclusively in federal courts").

Of note, petitioners do not identify any congressional finding or authoritative report that characterizes SLUSA as petitioners do—*viz.*, that the statute withdraws state court jurisdiction over all covered class actions asserting Securities Act claims. *Cf., e.g.*, S. Rep. No. 105-182, at 1 (1998) (stating that the purpose of the bill is "to limit the conduct of securities class actions under State law"). The most authoritative materials that petitioners cite instead state unqualifiedly that the statute applies only to "covered securities." *See, e.g.*, SLUSA § 2(5) (statutory finding); H.R. Conf. Rep. No. 105-803, at 13 (1998). But as noted, petitioners' reading has no such limitation: it applies to claims relating to *any* security.

Petitioners' other squibs from legislative history do not require extended attention because none actually characterize the statute as petitioners do and, even if they did, they would be entitled to little weight because they are from individual members of Congress or—even worse—hearing witnesses. The Court should be wary of isolated statements that were planted in the legislative history, precisely because there were not sufficient votes in Congress to adopt them as law. There is no reason to believe that Congress in enacting the bill, or the President in signing it, agreed with any statement that petitioners cite. But as the *amicus* briefs detail, even the individual statements relating to the bill—like the other legislative materials—support respondents' interpretation on the whole.

Because petitioners' interpretation of SLUSA cannot be reconciled with the statutory text, structure, or legislative materials, the judgment should be affirmed.

III. There Is No Merit To The Solicitor General's Removal Argument.

The Solicitor General agrees with respondents' interpretation of the state courts' jurisdiction under Section 77v(a). CVSG Br. 6. But at the certiorari stage, the government asserted that Section 77p(c) would permit the removal of a covered class action asserting a claim under the Securities Act, without regard to whether the complaint includes a state law claim. CVSG Br. 6. Respondents will have no written opportunity to answer the Solicitor General's *amicus* brief on the merits, but it presumably will make the same argument. Respondents therefore anticipate it here.

Petitioners did not attempt to remove this case on the basis suggested by the Solicitor General, probably because the government's reading cannot be reconciled with the plain statutory text, is internally contradictory, and is precluded by this Court's on-point precedent. Section 77p(c) is by its terms limited to the subset of covered class actions "set forth in subsection (b)." 15 U.S.C. § 77p(c). The Solicitor General acknowledges that removal under Section 77p(c) incorporates *one* of the distinct requirements of Section 77p(b): that the plaintiff allege a misrepresentation, omission, or fraud. CVSG Br. 14. But the government asserts without any explanation that it excludes another: that the complaint assert a claim "based upon the statutory or common law of any

State." *Id.* 16-17. There simply is no way consistent with the text to cherry-pick from the statute in that manner.

The Solicitor General's argument is also internally contradictory. In rejecting petitioners' interpretation of Section 77v(a) at the certiorari stage, the Solicitor General correctly reasoned that Congress would not have wanted to strip state courts of jurisdiction over more cases than it intended to preclude under Section 77p(b). CVSG Br. 9. But inconsistently, the government embraces essentially that result: its reading would permit removal (and thus eliminate state court jurisdiction) for cases that would not be precluded under Section 77p(b) because they do not include a state law claim.

For those and other reasons, the government's reading is in the teeth of *Kircher v. Putnam Funds Trust*, 547 U.S. 633 (2006), which rejected the exact argument that the Solicitor General makes here: that Section 77p(c) permits the removal of cases that are not prohibited by Section 77p(b). In *Kircher*, the district court remanded a suit to state court on a ground specified in Section 77p(b) but not 77p(c): that the complaint's allegations did not relate to the "purchase or sale" of a security. The Seventh Circuit held that it had jurisdiction over the defendant's appeal. It reasoned that *only* the limitations set forth *explicitly* in Section 77p(c)'s removal provision—not those incorporated through Section 77p(b)'s prohibition—were "jurisdictional" and thus subject to prohibition on appeals of remand orders. *Kircher*, 547 U.S. at 638-39.

This Court rejected that interpretation of Section 77p without difficulty. It adopted "the straightforward

reading: removal and jurisdiction to deal with removed cases is limited to those precluded by the terms of subsection (b)." *Id.* at 643. The Court explained that "if we did read the removal power that broadly there would be no point to the phrase 'as set forth in subsection (b),' for subsection (b) cases would be removable anyway as a subset of covered class actions." *Id.* Further, the very purpose of the remand provision is to guarantee a federal forum in the event a state court fails to dismiss a suit prohibited by Section 77p(b). *Id.* at 642-43. Thus, "removal jurisdiction under subsection (c) is . . . restricted to precluded actions defined by subsection (b)." *Id.* at 643-44.

The Seventh Circuit's reasoning in *Kircher* was at least coherent—*viz.*, the court of appeals believed that all the requirements set out in Section 77p(c) were jurisdictional and all those incorporated from Section 77p(b) were not. But the government's argument in this case—that Section 77p(c) includes one of Section 77p(b)'s restrictions but not another—has no textual basis at all. It is therefore even more obviously wrong.

The Solicitor General would distinguish *Kircher* because parts of two sentences in the opinion mentioned o[illegible] of Section 77p(b)'s requirements—that the suit invo[illegible]e "claims of untruth, manipulation, and so on" and "claims like untruth or deception," *id.* at 642—but did not repeat that subsection (b) is limited to state law claims. CVSG Br. 16 (citing *Kircher*, 547 U.S. at 642-43). This is bad literary criticism, not good legal argument. The *expressio unius* canon is not the guide to reading those snippets of *Kircher*, because the words of opinions are not written to be scrutinized like statutes.

The sentences the government cites expressly refer to subsection (b). The few words the government quotes from those sentences merely illustrate that subsection (b) has additional requirements beyond those specified in subsection (c). There are four: that the action be brought by a private party, under state law, alleging misstatements or fraud, in the purchase or sale of a covered security. 15 U.S.C. § 77p(b). It was not necessary for the opinion to reproduce all of them, every time. Nor did it purport to, as even the snippets quoted by the Solicitor General use the non-exclusive phrases "and so on" and "claims like." *Kircher*, 547 U.S. at 642.

Look no further than the fact that those same sentences omit subsection (b)'s requirement that the suit relate to "the purchase or sale" of a security. But that was the requirement directly at issue in *Kircher* itself. So it must have been within the Court's holding, despite that it was not mentioned in the short squibs the government now quotes.

In truth, the government does not seriously argue that its position can be reconciled with *Kircher*'s explicit holding, which was in turn based on the plain text and the statute's purpose: removal under Section 77p(c) is limited to the cases that are precluded by Section 77p(b). The inescapable position of the Solicitor General is that *Kircher* is wrongly decided: on the government's view, removal extends to cases that do not assert state law claims. That would mean that if the district court in *Kircher* had instead remanded the case on the ground that the complaint only asserted a claim under the Securities Act rather than state law, that ruling could have been appealed. That cannot be right. Because the government gives the

Court no reason to doubt the correctness of *Kircher*, much less overrule it, the judgment should be affirmed.

CONCLUSION

This Court should affirm the decision below.

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STATUTORY ADDENDUM

STATUTORY ADDENDUM

15 U.S.C. § 77p, Additional Remedies; limitation on remedies

(a) Remedies additional

Except as provided in subsection (b), the rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity.

(b) Class action limitations

No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging--

(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or

(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

(c) Removal of covered class actions

Any covered class action brought in any State court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).

(d) Preservation of certain actions

(1) Actions under State law of State of incorporation

(A) Actions preserved

Notwithstanding subsection (b) or (c), a covered class action described in subparagraph (B) of this paragraph that is based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

(B) Permissible actions

A covered class action is described in this subparagraph if it involves--

(i) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

(ii) any recommendation, position, or other communication with respect to the sale of securities of the issuer that--

(I) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

(II) concerns decisions of those equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

(2) State actions

(A) In general

Notwithstanding any other provision of this section, nothing in this section may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.

(B) "State pension plan" defined

For purposes of this paragraph, the term "State pension plan" means a pension plan established and maintained for its employees by the government of the State or political subdivision thereof, or by any agency or instrumentality thereof.

(3) Actions under contractual agreements between issuers and indenture trustees

Notwithstanding subsection (b) or (c), a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee may be maintained in a State or Federal court by a party to the agreement or a successor to such party.

(4) Remand of removed actions

In an action that has been removed from a State court pursuant to subsection (c), if the Federal court determines that the action may be maintained in State court pursuant to this

subsection, the Federal court shall remand such action to such State court.

(e) Preservation of State jurisdiction

The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

(f) Definitions

For purposes of this section, the following definitions shall apply:

(1) Affiliate of the issuer

The term "affiliate of the issuer" means a person that directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with, the issuer.

(2) Covered class action--

(A) In general

The term "covered class action" means--

(i) any single lawsuit in which--

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed

parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which--

(I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

(B) Exception for derivative actions

Notwithstanding subparagraph (A), the term "covered class action" does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

(C) Counting of certain class members

For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

(D) Rule of construction

Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.

(3) Covered security

The term "covered security" means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 77r(b) of this title at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under this subchapter pursuant to rules issued by the Commission under section 77d(2) of this title.

15 U.S.C. § 77v, provides, in relevant part:

(a) Federal and State courts; venue; service of process; review; removal; costs

The district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, except as provided in section 77p of this title with respect to covered class actions, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. In any action or proceeding instituted by the Commission under this subchapter in a United States district court for any judicial district, a subpoena issued to compel the attendance of a witness or the production of documents or tangible things (or both) at a hearing or trial may be served at any place within the United States. Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil Procedure shall not apply to a subpoena issued under the preceding sentence. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of Title 28. Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No

costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts.

Prior to its amendment in 1998, 15 U.S.C. § 77v(a) provided:

(a) Federal and State courts; venue; service of process; review; removal; costs

The district courts of the United States and United States courts of any Territory, shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of Title 28. No case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts.

No. 15-1439

IN THE
Supreme Court of the United States

CYAN, INC., *et al.*,

Petitioners,

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, *et al.*,

Respondents.

On Writ of Certiorari to the
Court of Appeal of the State of California,
First Appellate District

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RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the opening brief for petitioners remains accurate.

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IN THE

Supreme Court of the United States

No. 15-1439

CYAN, INC., *et al.*,

Petitioners,

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, *et al.*,

Respondents.

On Writ of Certiorari to the
Court of Appeal of the State of California,
First Appellate District

REPLY BRIEF FOR PETITIONERS

INTRODUCTION

Respondents propose an interpretation of the "except" clause that would render it inoperative. They suggest that their reading would clarify that section 16(b) of the Securities Act of 1933 (1933 Act) withdraws jurisdiction over "mixed cases." But that argument crumbles on even minimal scrutiny. Section 16(b) places no limit on jurisdiction, imposes no restriction on federal claims, and leaves no pertinent ambiguity to clear up.

Ultimately, then, respondents must admit where their reading leads: It would render "the jurisdictional amendment * * * a road to nowhere," robbing Congress's enactment of all meaning. Resp. Br. 24.

Not incidentally, it would enable respondents and every other plaintiff class to sidestep the carefully crafted restrictions of the Private Securities Litigation Reform Act (Reform Act)—including its limits on strike suits, professional plaintiffs, and abusive attorney's fees—through the simple expedient of filing federal securities class actions in state court.

This is no way to read a statute. Congress made clear which claims it sought to "except" from the concurrent jurisdiction of state courts: 1933 Act claims in "covered class actions," "as provided in [section 16]." 15 U.S.C. § 77v(a). That reading gives force to the words Congress enacted. It avoids opening a gaping hole at the center of Congress's regulatory scheme. And it achieves the express aims of the Securities Litigation Uniform Standards Act of 1998 (SLUSA): vindicating the objectives of the Reform Act, stemming the "shift[] from Federal to State courts," and ensuring that all securities class actions of federal concern are governed by "Uniform Standards." Pub. L. No. 105-353, § 2(1)-(2), (5).

The judgment should be reversed.

ARGUMENT

I. PETITIONERS' READING IS THE ONLY ONE COMPATIBLE WITH SLUSA'S TEXT, STRUCTURE, AND PURPOSES

A. Petitioners' Reading Follows From And Gives Effect To The Clause's Text

Section 22(a) of the 1933 Act provides that state courts have "concurrent" "jurisdiction * * * of all suits * * * brought to enforce [the 1933 Act]," "except as provided in [section 16] with respect to covered class actions." 15 U.S.C. § 77v(a). By its plain terms, this clause must "except" some set of 1933 Act claims

from the concurrent jurisdiction of state courts. And the clause's text makes clear which claims those are: 1933 Act claims in "covered class actions," "as provided in [section 16]." This reading accords with the way similar phrases are used elsewhere in the U.S. Code and makes sense of the clause's text. Equally important, it is the only construction that gives the "except" clause any effect, rather than reducing it to "a road to nowhere." Resp. Br. 24.

1. Petitioners' interpretation is the best reading of the clause's text

Start, as the Court always does, with the words of the statute. The "except" clause consists of two halves: (1) "except as provided in [section 16]" and (2) "with respect to covered class actions." The first half points the reader to section 16: It informs her that the jurisdiction of state courts is limited "in accordance with what" is specified (or "stipulate[d]") in that section. Oxford English Dictionary (3d ed., rev. 2017) (defining "as" to mean "in accordance with what (is)"); *id.* (defining "provide" to mean "[t]o stipulate in a will, statute, etc."). The second half then tells the reader where in section 16 to look: the term "covered class actions." Putting the halves together, the clause thus withdraws jurisdiction as to "covered class actions" specified in section 16.

Respondents and the United States argue that the text cannot bear this reading because the words "as provided in" must incorporate "a self-operative limit" from another statute. Resp. Br. 14; *see* U.S. Br. 12-13. It is true enough that Congress *sometimes* uses the words "as provided in" in that sense. But that is not the *only* way Congress uses the phrase. Some statutes use "as provided in" more generally to

borrow a term or concept from another provision, which requires some translation to be incorporated into the relevant statute. *See Torres* v. *Lynch*, 136 S. Ct. 1619, 1625-26 (2016) (explaining that the phrase "described in" sometimes "convey[s] exactness," and other times "has a looser meaning" that "entails * * * not precise replication, but convey[ance of] an idea or impression" (internal quotation marks omitted)).

To take just one representative example, 33 U.S.C. § 3801(9) provides that "[t]he term 'person' means * * * any department, agency, or instrumentality of the United States, except as provided in section 3802(b)(2)." Under respondents' reading, one would expect the cross-referenced section to provide a "self-operative limit" on the meaning of the term "person." Instead, however, it states that "[t]he Administrator [of the Environmental Protection Agency] may apply any requirement of this chapter to one or more classes of vessels," subject to the concurrence of the relevant agency. 33 U.S.C. § 3802(b)(2)(A). With a bit of work, one can understand what Congress meant through the cross-reference: that certain vessels are not "persons" unless the Administrator affirmatively designates them as such. But the cross-referenced provision assuredly does not "supply" that limit of its own force.[1]

[1] For other examples, *compare, e.g.*, 37 U.S.C. § 101(22) ("[t]he term 'inactive-duty training' * * * does not include work or study in connection with a correspondence course" "except as provided in section 206(d)(2)"), *with id.* § 206(d)(2) (National Guard reserves "may be paid compensation under this section" upon "successful completion of a course of instruction"); *and* 42 U.S.C. § 254*l*(g) ("A scholarship * * * shall consist of * * * the

An ordinary reader of English can easily understand the phrase "as provided in" used in this way. Consider a parking sign that says, "No parking, except as provided in 5 U.S.C. § 6103 with respect to legal public holidays." Section 6103(a) contains a list of "legal public holidays"; it says nothing about parking. But a reader would have little difficulty grasping what the sign means: that a person cannot park except on legal public holidays, as defined in 5 U.S.C. § 6103(a).

Several contextual considerations indicate that Congress used the phrase "as provided in" similarly in the "except" clause. *First*, Congress conjoined the words "as provided in [section 16]" with the phrase "with respect to covered class actions"—thereby pointing the reader to a procedural vehicle ("covered class actions") rather than a particular operative subsection. Respondents and the United States cannot explain why the words "with respect to covered class actions" appear in the statute at all. Their textual analyses hardly mention these six words, and do not even purport to give them effect. *See* Resp. Br. 11-14; U.S. Br. 20-21.[2]

Second, it is significant that Congress chose to cross-reference section 16 as a whole, rather than a particular subsection. Had Congress wished to

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amount (except as provided in section 292k of this title) of" tuition and educational expenses), *with id.* § 292k ("Federal credit unions shall * * * have power to make insured loans to eligible students").

[2] Respondents cite several statutes containing the words "with respect to [X]," but they only prove the point; in each instance, that phrase works to narrow or clarify the statutory cross-reference. *See* Resp. Br. 13-14 n.5.

incorporate the preclusion rule contained in section 16(b), it could easily have cited that subsection directly, much as it did elsewhere in SLUSA. *See* U.S. Br. 13 (listing provisions). That Congress cited section 16 more broadly suggests that its focus was not on a particular subsection but on the term—"covered class actions"—to which the "except" clause expressly refers.

Third, a comparison with the anti-removal provision makes clear that these textual choices were deliberate. As respondents and the United States note, Congress enacted the "except" clause side-by-side with an exception to the anti-removal provision, and used comparable phrasing in both provisions. *See* SLUSA § 101(a)(3)(A)-(B). There is accordingly a strong presumption that each difference in their language was purposeful. *Russello* v. *United States*, 464 U.S. 16, 23 (1983). It is telling, then, that the anti-removal provision omits the words "with respect to covered class actions" and cross-references section 16(c) directly. *See* 15 U.S.C. § 77v(a) ("Except as provided in [section 16(c)]"). Petitioners can account for why Congress drafted the provisions differently; respondents and the United States cannot.

Respondents' attempts to reconcile their reading with these textual choices are unpersuasive. Respondents claim (at 14) that the "except" clause cites section 16 as a whole because Congress wished to incorporate the "exclusions" and "definitions" applicable to section 16(b). But those exclusions and definitions apply to section 16(b) expressly. *See* 15 U.S.C. § 77p(d)(1)(A), (d)(3), (f). Moreover, section 16(c) is subject to all the same exceptions and definitions, yet Congress deemed it appropriate to cross-

reference section 16(c) directly in the anti-removal provision. *See id.* § 77v(a).

Respondents also observe that when the words "as provided in" appear elsewhere in SLUSA, they typically cross-reference a "substantive limit[]." Resp. Br. 16-17; *see* U.S. Br. 13. But none of those provisions includes the phrase "with respect to" or cites a statutory section as a whole. Nor would reading them as respondents propose render the provisions superfluous, overthrow SLUSA's design, or thwart the Act's express purposes. *See infra* pp. 7-20. That is more than enough context to demonstrate that Congress used the words differently in the "except" clause. *See Util. Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2441 (2014 T]he presumption of consistent usage 'readily yields' to context.").

Finally, respondents quibble (at 15) that Congress could have expressed itself more clearly by rearranging the clause's words and replacing "provided" with "defined." The formulation Congress used, however, is an established and comprehensible way of cross-referencing a term from another statute. Furthermore, Congress inserted this phrase into a highly complex provision, which even the most skillful drafter would have had difficulty amending clearly. That the final product falls somewhere short of a "*chef d'oeuvre* of legislative draftsmanship" is no reason to declare it inoperative. *Id.*

2. Respondents' and the United States' reading would render the clause a nullity

Petitioners' reading is reinforced by the fact that it is the only one that gives the "except" clause "real and substantial effect." *United States* v. *Quality Stores, Inc.*, 134 S. Ct. 1395, 1401 (2014). Under the

readings respondents and the United States propose, the clause would "except" nothing from the jurisdiction of state courts—reducing the clause to a nullity, and for all practical purposes excising it from the U.S. Code.

a. As noted, respondents maintain that the "except" clause must be read to cross-reference a "self-operative limit" on state-court jurisdiction over 1933 Act claims. Resp. Br. 14. But as the United States correctly observes, section 16 "contains no such limitation." U.S. Br. 11. The section's operative provision, section 16(b), *precludes* a class of claims; it does not limit jurisdiction. Further, section 16(b) does not address federal claims at all: It applies only to actions "based upon the statutory or common law of [a] State," and thus imposes no restriction on claims "brought to enforce" the 1933 Act. Finally, section 16(b) limits the authority of both state *and* federal courts, thus making it a wholly inapposite source for a limit on "State * * * court[s]" alone. If the only function of the "except" clause is to incorporate some "self-operative limit" contained in section 16, then it does exactly nothing.

At the certiorari stage, respondents were content to leave it at that. *See* Br. in Opp. 1. Apparently realizing that position was untenable, respondents have since tried to identify *some* set of claims that the "except" clause exempts from state-court jurisdiction. Their late-breaking position is that the clause serves to "strip[] state courts of jurisdiction over mixed cases"—that is, covered class actions that raise both 1933 Act and state-law claims. Resp. Br. 5.

That is impossible. First, section 16(b) does not concern the federal half of mixed cases at all. It only prohibits courts from entertaining "action[s] based upon the statutory or common law of a[] State." 15 U.S.C. § 77p(b). Accordingly, if plaintiffs bring a mix of state and federal claims, section 16(b) instructs courts to dismiss the state claims as precluded while leaving the federal claims undisturbed. *See, e.g., In re Kingate Mgmt. Ltd. Litig.*, 784 F.3d 128, 153 (2d Cir. 2015); *see also Jones* v. *Bock*, 549 U.S. 199, 221 (2007) (where a statute forbids a particular type of "action," and "a complaint contains both good and bad claims," the court "proceeds with the good and leaves the bad"). Section 16(b) thus imposes no restriction on 1933 Act claims even when brought as part of mixed actions—and so furnishes no limit on those claims for the "except" clause to incorporate.

Second, the problem remains that section 16(b) governs preclusion, whereas the "except" clause divests state courts of jurisdiction. *See Kircher* v. *Putnam Funds Tr.*, 547 U.S. 633, 636 n.1 (2006). No matter how far section 16(b) extends, it cannot supply the self-operative limit on jurisdiction that respondents' reading demands.

Recognizing this problem, respondents abruptly drop their insistence on a "self-operative limit" midway through their brief, saying that this "does not accurately capture how laws are actually written." Resp. Br. 23. Instead, they say, the "except" clause merely needs to cross-reference a provision that will help "define the scope" of the jurisdictional provision. *Id.* at 22. That is a welcome concession, but it also forfeits the textual premise on which respondents' entire argument rests. For if the "except" clause simply functions to "define the scope" of

state courts' jurisdiction, then the Court need not look far to determine how Congress wished it defined: as extending to 1933 Act claims except in "covered class actions."

As a back-up argument, respondents propose (at 24) that the "except" clause can be read to "incorporate" section 16(c). That proposal makes no sense. Section 16(c) does not create an "except[ion]" to concurrent jurisdiction. It merely gives defendants the *option* to remove to federal court. 15 U.S.C. § 77p(c). It accordingly cannot furnish the "limit" on state-court jurisdiction that respondents' reading requires.

b. The United States, to its credit, recognizes that the textual reading it proposes would deprive the "except" clause of any real effect. U.S. Br. 20. But it argues that Congress might still have enacted the clause to clear up a sliver of ambiguity. "Congress," the United States speculates, "may have been concerned" that plaintiffs would try to argue that section 22(a) "provides state courts with jurisdiction over mixed class actions in their entirety." *Id.* It suggests that Congress enacted the "except" clause to "reinforce[] * * * that state courts may not entertain any state-law claims," even as part of mixed actions. *Id.*

This argument rests on a fatally flawed premise. Contrary to the United States' apparent belief, state courts *do* have jurisdiction over state-law claims barred by section 16(b). *Kircher* expressly said so: It explained that "nothing in the Act gives the federal courts exclusive jurisdiction over preclusion decisions," and that state courts are an "equally competent body" to determine whether state-law claims should be dismissed as nonactionable under section

16(b). 547 U.S. at 646. Accordingly, if plaintiffs were to argue that SLUSA does not divest state courts of jurisdiction over state-law claims in a mixed action, they would be *correct*. Congress surely did not enact the "except" clause to "reinforce[]" a mistaken view to the contrary.

The United States suggests (at 21) that Congress may have been worried that courts would hold that section 22(a) overrode the *substantive* "limitations imposed by [section 16(b)]." That worry is wholly implausible. Section 22(a) grants jurisdiction over federal-law claims. Section 16(b) precludes state-law claims. There is no "conflict," U.S. Br. 22, or even arguable inconsistency, between these two provisions. Although Congress sometimes enacts text to dispel a negative implication, illustrate the meaning of a broad term, or remove other plausible "doubt[s]" about a statute's meaning, *Marx* v. *Gen. Revenue Corp.*, 568 U.S. 371, 383-384 (2013), there is no authority for the proposition that it enacts language to foreclose frivolous arguments any court would swiftly reject.

c. With all else having failed, respondents throw up their hands and ask the Court to "hold that the jurisdictional amendment is essentially a road to nowhere." Resp. Br. 24. The United States arrives at essentially the same place, suggesting that Congress may have enacted the clause to "address[] a non-existent risk." U.S. Br. 23. Those solutions are unacceptable. Congress took care to amend section 22(a) by adding the "except" clause. That amendment should be read as having "real and substantial effect," not reduced to a worthless gewgaw.

B. Petitioners' Reading Comports With SLUSA's Structure

1. The statutory structure confirms that petitioners' reading is the correct one. The different provisions of SLUSA and the Reform Act work together "as a symmetrical and coherent regulatory scheme" to prevent plaintiffs from maintaining securities class actions of federal concern in state court, free of the Reform Act's restrictions. *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 569 (1995). Thus, section 16(b) precludes *state-law* covered class actions involving nationally traded securities. And sections 16(c) and 22(a) authorize removal of *mixed* covered class actions involving both state-law and 1933 Act claims.

It would be exceedingly anomalous if SLUSA did not similarly enable defendants to move exclusively *federal* covered class actions out of state court. Those are the securities class actions of greatest federal concern. And the Reform Act carefully regulates these suits through a suite of restrictions that apply exclusively in federal court. *See* 15 U.S.C. § 77z-1(a). Construing the "except" clause to divest state courts of jurisdiction over 1933 Act covered class actions would ensure that plaintiffs cannot evade the Reform Act, and sidestep SLUSA's other limits, through the expedient of filing a federal class action in state court.

The United States largely agrees with this structural analysis, which it says "reflects an accurate assessment of congressional purpose." U.S. Br. 15. As it explains, "Congress would not have been content to leave 1933 Act claims 'stuck in state court,' where they would not be subject to the [Reform Act]'s substantive and procedural requirements." *Id.*

(quoting Pet. Br. 18). Although the United States believes there is another route to reaching that result, it concurs on this critical point: SLUSA cannot reasonably be construed to deprive defendants of a federal forum for 1933 Act covered class actions. *See id.* at 26.

2. Respondents nevertheless propose an interpretation of the statute that would do just that. They fail to offer any plausible structural defense of this reading.

Respondents claim that their interpretation "harmonize[s]" the various provisions of SLUSA by causing each one to have an "identical * * * scope." Resp. Br. 17, 20. But it is evident from the plain text of the statute that Congress intended sections 16(b) and 22(a) to cover *different* sets of claims. Section 16(b) precludes claims "based upon * * * *[s]tate*" law, 15 U.S.C. § 77p(b) (emphasis added), whereas section 22(a) withdraws jurisdiction over actions "brought to enforce * * * *this subchapter*" and authorizes removal of "case[s] arising under *this subchapter*," *id.* § 77v(a) (emphases added). Furthermore, Congress enacted SLUSA to prevent "evasion of the [Reform Act]." Resp. Br. 3. Construing the statute to deal with a single, narrow form of evasion—while leaving wide open an alternative way of avoiding the Act's limits—is hardly faithful to that end.

Respondents also argue (at 19) that "[t]he point" of SLUSA's provisions "is to require plaintiffs to plead their claims under federal law," and nothing more. That cannot be right. Respondents themselves acknowledge that SLUSA authorizes removal of mixed cases in their entirety. And the Reform Act's restrictions on 1933 Act class actions apply exclu-

sively in federal court. 15 U.S.C. § 77z-1(a). It is implausible that Congress was indifferent to whether federal class actions were exempt from, rather than subject to, these detailed requirements.

3. Lacking any plausible way of reconciling their reading with the statutory structure, respondents devote most of their energy to attacking perceived flaws in petitioners' interpretation. Even if these critiques had merit, they pale in comparison to the gaping hole respondents' reading would carve into the statute. But none of their criticisms withstands scrutiny.

a. Respondents argue (at 19) that it would have been "bizarre" for Congress to prescribe "different kinds of treatment" for state-law class actions, mixed class actions, and 1933 Act class actions. But the differences in treatment all flow from a single aim: to require plaintiffs to file securities class actions in federal court, subject to the protections of the Reform Act. Thus, Congress precluded state-law class actions, which are exempt from the Reform Act entirely. 15 U.S.C. § 77p(b). It required plaintiffs to file 1933 Act class actions directly in federal court, where the Reform Act's provisions apply. *Id.* § 77v(a). And for mixed class actions, it split the baby, authorizing defendants to remove the suits to federal court, where the state-law claims would be dismissed and the 1933 Act claims could proceed subject to the Reform Act. *Id.* §§ 77p(c), 77v(a). This scheme achieves Congress's goals just about as efficiently as possible; there is nothing "bizarre" about it.

b. Respondents, echoed by the United States, also argue that it would be anomalous for SLUSA to exclude *all* 1933 Act covered class actions from state-

court jurisdiction, given that section 16(b) precludes only those state-law covered class actions that (1) involve nationally traded securities and (2) allege "an untrue statement or omission of a material fact" or the use of a "manipulative or deceptive device." Resp. Br. 18; *see* U.S. Br. 17 (quoting 15 U.S.C. § 77p(b)). But Congress imposed both requirements for reasons unique to state-law claims that have no application to 1933 Act class actions.

First, as this Court has explained, Congress limited its preclusion of state-law class actions to nationally traded securities because it wished to avoid intruding on "state legal authority * * * over matters that are primarily of state concern." *Chadbourne & Parke LLP* v. *Troice*, 134 S. Ct. 1058, 1068 (2014). Because of the 1933 Act's broad definition of "security," precluding all state-law securities class actions would have significantly "interfere[d] with state efforts to provide remedies for victims of ordinary state-law frauds." *Id.* Those federalism concerns carry little if any weight when limiting the *forum* in which plaintiffs may bring *federal* securities class actions.

Second, the requirement that precluded state-law claims involve untrue statements or deceptive devices "expressly replicates" an element of sections 11 and 12 of the 1933 Act. *Kingate*, 784 F.3d at 139; *see* 15 U.S.C. §§ 77k(a), 77*l*(a)(2). Congress thus had no need to reiterate that requirement when referring to 1933 Act claims directly. There is one narrow type of 1933 Act claim that arguably need not entail untrue statements or deceptive devices: a claim under section 5 of the Act alleging the sale of unregistered securities in interstate commerce. 15 U.S.C. §§ 77e, 77*l*(a)(1); *but see Troice*, 134 S. Ct. at 1067 (noting that these claims also entail "deceiv[ing] a person").

But section 16(b) does not preclude claims involving unregistered securities for the straightforward reason that section 16(b) is limited to securities traded on national exchanges, which by definition are either registered or exempt from registration requirements. *See* 15 U.S.C. §§ 77p(f)(3), 77r(b). Congress's omission of such claims from section 16(b) thus says nothing about whether it wished them included in section 22(a).

The Reform Act supports these conclusions. When Congress imposed limits on 1933 Act class actions in that statute, it did not confine them to suits involving nationally traded securities and untrue statements or deceptive devices. It stands to reason that the "except" clause, which seeks to prevent evasion of the Reform Act's standards, does not include such limits, either.

The United States objects (at 19) that "the [Reform Act's] protections apply to all plaintiff class actions arising under the 1933 Act," whereas "the 'except' clause is limited to 'covered class actions.'" But Congress had no choice but to draft the statutes slightly differently. The Reform Act's class-action protections apply only in federal court, and so extend to any 1933 Act suit "brought as a plaintiff class action *pursuant to the Federal Rules of Civil Procedure*." 15 U.S.C. § 77z-1(a) (emphasis added). The "except" clause, in contrast, withdraws jurisdiction from state courts, where the Federal Rules do not apply. Congress accordingly needed to find a different way of capturing the same class of suits. It did so by adopting the term "covered class action," which closely tracks the federal definition, but also contains rules that make it predictable for state courts to

apply and difficult for plaintiffs to skirt. S. Rep. No. 105-182, at 6-7 (1998).

C. Petitioners' Reading Accords With SLUSA's Purposes

SLUSA's history and purposes provide further reason to read the statute as petitioners propose.

1. The Act's express findings make clear that Congress had three interrelated goals in enacting SLUSA: first, to assist the Reform Act in "fully achieving its objectives," SLUSA § 2(1); second, to halt the "shift[] from Federal to State courts" of "securities class action lawsuits," *id.* § 2(2)-(3); and, third, to "enact national standards for securities class action lawsuits involving nationally traded securities," *id.* § 2(5). Petitioners' reading would advance these aims, whereas respondents' would thwart them all.

a. *"[F]ully achieving [the Reform Act's] objectives."* Respondents do not dispute that the Reform Act sought to curb abuses in federal securities litigation by imposing stringent restrictions on 1933 Act class actions filed in federal court. *See* 15 U.S.C. § 77z-1(a). And they do not deny that their reading would permit "plaintiffs' lawyers * * * to circumvent the Act's provisions, by * * * filing frivolous and speculative lawsuits in State court, where essentially none of the Reform Act's procedural or substantive protections against abusive suits are available." H.R. Conf. Rep. No. 105-803, at 14-15 (1998).

Respondents' only defense (at 27-28) is that this sort of evasion "cannot be circumvention" of the Reform Act, because the Reform Act *itself* did not bar plaintiffs from bringing 1933 Act suits in state court. That is absurd. The entire premise of SLUSA is that

the Reform Act did not go far enough, and that additional protections were required to "fully achiev[e] its objectives." Inferring that Congress intended only those restrictions in the Reform Act and nothing more would deny SLUSA its central purpose.

b. *Halting the "shift[] from Federal to State courts."* Respondents' reading would also fail to stem the shift of securities class actions from federal to state courts. Under their interpretation, plaintiffs would remain free to file federal securities class action suits in state court. And as the dramatic increase in class-action filings in California illustrates, plaintiffs would have every incentive to do so, given that proceeding in a state forum would free them of the Reform Act's strictures. *See* Amicus Br. of N.Y. Stock Exch. 9; Amicus Br. of Law Professors 19-20.

Respondents claim that when Congress lamented the shift from federal to state court, its concern was really with suits filed *under state law*. But that is not what the Act's findings say. Nor does it make sense. Prior to SLUSA, plaintiffs could evade the Reform Act's restrictions by filing state-law suits in "State *or* Federal court." 15 U.S.C. § 77p(b) (emphasis added). Congress's focus on the forum indicates that it was worried about attempts to circumvent those Reform Act requirements that apply in federal court alone—namely, the Act's procedural limitations on federal securities class actions. *Id.* § 77z-1(a).

SLUSA's legislative history overwhelmingly supports this conclusion. Committee reports, sponsors, witnesses, and even opponents stated without qualification that SLUSA would "make[] Federal court the exclusive venue for most securities class action

lawsuits." H.R. Conf. Rep. No. 105-803, at 13; *see* Pet. Br. 21-24.[3] Tellingly, respondents do not even try to make a contrary showing. They assert that most class-action suits filed between the Reform Act and SLUSA involved state-law claims. Resp. Br. 28. Yet even they acknowledge this was not the exclusive means of evasion practiced during that period. *Id.* And SLUSA's text, its findings, and its drafters' statements all make clear that Congress aimed to prevent *any* efforts to evade the Reform Act by filing in state court, not just the particular form of evasion most prevalent at the time. *See* 15 U.S.C. § 77v(a); SLUSA § 2(2)-(3); Pet. Br. 21-22.

c. *"[E]nact[ing] national standards."* Finally, respondents' reading would thwart the Act's stated goal of establishing "Uniform Standards" for federal securities class actions. If plaintiffs could file 1933 Act class actions in state court, they would be free of the procedural safeguards Congress imposed for such suits, including the standards governing professional plaintiffs, damages awards, attorney's fees, and many other matters. Pet. Br. 26-27.

Respondents claim (at 29) that it is enough that every covered class action would be governed by "uniform federal *substantive* standards." But SLUSA and its legislative history make plain that Congress was concerned about procedure as well as substance. *See, e.g.*, SLUSA § 101(a)(2) (preventing "[c]ircumvention of [s]tay[s] of [d]iscovery"); Pet. Br.

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[3] The Conference Report says "most" because SLUSA "preserves State jurisdiction" over the "specific types of [state-law] actions" listed in sections 16(d) and 16(f)(2)(B). H.R. Conf. Rep. No. 105-803, at 13-14.

25-29. And experience confirms that where businesses are no longer protected by the Reform Act's procedures—as is currently the case in California—they are once again subject to the sort of extortionate and meritless litigation the Reform Act was designed to prevent. *See* Amicus Br. of N.Y. Stock Exch. 9-12; Amicus Br. of Sec. Indus. & Fin. Mkts. Ass'n *et al.* 6-12; Amicus Br. of Alibaba Grp. *et al.* 16-25; Amicus Br. of Law Professors 19-25.

2. Respondents point to snippets of text from three precedents that they claim have settled for good that Congress's sole purpose in enacting SLUSA was "to stop the use of state law securities claims to evade the [Reform Act]'s restrictions." Resp. Br. 26. That argument is as wrong as it sounds.

Of the cases respondents cite, only one—*Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71 (2006)—contains any extended analysis of SLUSA's purposes, and that analysis largely favors petitioners. The Court explained that SLUSA was prompted by the fact that plaintiffs were "avoid[ing] the federal forum altogether"; that "state-court litigation," though previously "rare," had become common; and that Congress enacted SLUSA "[t]o stem this 'shif[t] from Federal to State courts.'" *Id.* at 82 (quoting SLUSA § 2(2)). The Court did note that plaintiffs had begun "bringing class actions under state law, often in state court." *Id.* But the Court may have made that observation merely because *Dabit* itself concerned "state-law class-action claims" barred by SLUSA's preclusion provision. *Id.* at 74. The Court certainly said nothing to suggest that SLUSA's *only* purpose was to eliminate state-law claims.

Kircher and *Troice* are even less helpful for respondents. Like *Dabit*, these cases only involved the scope of SLUSA's preclusion provision. *Kircher* engaged in no independent analysis of SLUSA's purposes; it just quoted three sentences from *Dabit* when introducing the statute. 547 U.S. at 636. And *Troice*'s discussion of the Act's purposes consists of a single quotation from the statutory findings that it said reflected Congress's desire to avoid "limit[ing] the scope of protection under state laws" for "garden-variety fraud." 134 S. Ct. at 1068. The notion that these cases "carefully studied SLUSA's text, structure, and history," adopted respondents' restrictive interpretation, and foreclosed all future recourse to the Act's findings and history, Resp. Br. 24-27, 29, is pure fiction.[4]

D. Background Principles Do Not Warrant A Different Interpretation

Finally, respondents invoke various "tie-breaker" principles. Resp. Br. 10. As an initial matter, there is no "tie" to break: Respondents' proposed reading would render the statutory text inoperative, subvert the statutory structure, and contravene SLUSA's

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[4] Respondents also wrench several statements out of context to suggest that the Court found that Congress sought to preserve state-court jurisdiction over federal claims. *See* Resp. Br. 25-26. Each of the statements they quote unambiguously refers to state-law clams. *See Dabit*, 547 U.S. at 87 (referring to "certain [state-law] class actions" exempted by 15 U.S.C. § 78bb(f)(3)(A)-(C) and (f)(5)(C)); *Kircher*, 547 U.S. at 644 n.12 (discussing "state-law cases" outside the scope of section 16(b)); *Troice*, 134 S. Ct. at 1066 (explaining that section 16(b) does not affect state-law claims in "uncovered securities").

purposes. And the principles respondents invoke are inapplicable even on their own terms.

Respondents claim (at 10-11) that Congress would have spoken "clearly" if it intended to upset "settled law" or "change the federal-state balance." Prior to the Reform Act, however, "there was essentially no significant securities class action litigation brought in State court." *Dabit*, 547 U.S. at 88 (quoting H.R. Conf. Rep. No. 105-803, at 14). Even if such suits were "theoretically available," they were "virtually unheard of." *Id.* Indeed, respondents have not identified *any* 1933 Act class action filed in state court until the Reform Act was passed, when—as they acknowledge, Resp. Br. 28—such cases suddenly emerged. Just as *Dabit* explained in rejecting a similar argument, "[t]his is hardly a situation * * * in which a federal statute has eliminated a historically entrenched state-law remedy." 547 U.S. at 88.

Furthermore, Congress *did* speak clearly in expressing its intention to divest state courts of jurisdiction. SLUSA announces Congress's aim of stemming the "shift[] from Federal to State courts" of "securities class action lawsuits," SLUSA § 2(2), and expressly "except[s] * * * covered class actions" from state courts' "concurrent" "jurisdiction," 15 U.S.C. § 77v(a). Unlike all of the cases respondents cite—which involved statutes that contained no language addressing state-court jurisdiction, Resp. Br. 11 n.3—here Congress made clear it wished to "except" some cases from the jurisdiction of state courts; the only question is the scope of that directive. And the "explicit" statutory text, the "unmistakable implication from legislative history," and the "clear incompatibility between state-court jurisdiction and federal interests," *Tafflin* v. *Levitt*, 493 U.S. 455, 459-460

(1990), all indicate that Congress wished to "except" 1933 Act claims in "covered class actions." Pet. Br. 38.

II. IF THIS COURT REJECTS PETITIONERS' READING, IT SHOULD ADOPT THE UNITED STATES'

The United States recognizes that the "efficacy" of the Reform Act's "substantive and procedural requirements * * * depends on defendants' access to a federal forum." U.S. Br. 23. But it disagrees on how SLUSA ensures that "access." In the United States' view, section 16(c) authorizes defendants to remove 1933 Act covered class actions involving covered securities to federal court. *Id.*

The United States' reading of section 22(a) is not as faithful to SLUSA's text, structure, and purpose as petitioners'. As noted above, the United States would deprive the "except" clause of meaningful effect. And the United States' construction of that clause rests on several textual and structural arguments that cannot withstand close scrutiny. *See supra* pp. 3-7, 10-11, 14-16.

Nonetheless, the United States' interpretation of the statute is more faithful than respondents'. It would ensure that 1933 Act class actions could be heard in a federal forum, subject to the protections of the Reform Act. U.S. Br. 23. And it would "vindicate[]" Congress's objectives by "preventing circumvention" of the Reform Act, stemming the shift of securities class actions from federal to state court, and ensuring that 1933 Act class actions are gov-

erned by uniform substantive and procedural standards. *Id.*[5]

Accordingly, if the Court agrees with respondents' interpretation of the "except" clause, it should also adopt the United States' reading of section 16(c). The various provisions of SLUSA work together as a coherent scheme. Adopting respondents' reading of the "except" clause and nothing more would open up a gaping hole in that scheme. If the Court opens that hole, it should plug it. Any other course would allow for "state-court circumvention of [Reform Act] requirements," *id.* at 24 n.2, sow confusion in the lower courts, and enable the abuse of the class-action vehicle that the Reform Act and SLUSA were enacted to foreclose.

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[5] Respondents intimate that petitioners did not seek removal because petitioners thought the case was not removable. Resp. Br. 31. That suggestion is baseless. Petitioners did not seek removal because respondents' incorrect reading of the statute was so entrenched in the relevant jurisdiction that litigants had been sanctioned for attempting to remove 1933 Act cases. *See Iron Workers Mid-S. Pension Fund* v. *Terraform Glob., Inc.*, No. 15-cv-6328-BLF, 2016 WL 827374, at *5-6 (N.D. Cal. Mar. 3, 2016); *see also* Pet. 11-13 & nn.8-16 (describing inconsistent removal rules in the lower courts).

CONCLUSION

The judgment of the California Court of Appeal should be reversed.

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RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

CYAN, INC., *et al.*,

Petitioners,

v.

BEAVER COUNTY EMPLOYEES' RETIREMENT FUND, *et al.*,

Respondents.

On Petition for a Writ of Certiorari
to the Court of Appeal of the State of California,
First Appellate District

RESPONDENTS' SUPPLEMENTAL BRIEF

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RESPONDENTS' SUPPLEMENTAL BRIEF

The Solicitor General recommends that this Court grant certiorari and issue a two-part opinion. First, with respect to the Question Presented, the opinion would affirm the superior court's judgment that it has jurisdiction to decide respondents' suit, which asserts only claims under the 1933 Securities Act. CVSG Br. 6-12. Second, the Court's opinion would state in dictum that under 15 U.S.C. § 77p(c) petitioners could have removed the case to federal district court for decision on the merits. *Id.* 13-17.

That recommendation lacks merit. With respect to the Question Presented, the Solicitor General correctly recognizes that the superior court's ruling is correct and that it is not the subject of any conflict among the federal or state appellate courts. Moreover, there is no dispute that if a conflict does emerge the issue can easily reach this Court in another case arising from the state courts. *See* Part I, *infra*. With respect to the removal provision in Section 77p(c), the Solicitor General's brief recognizes that the issue is not encompassed within the Question Presented, has been disavowed by petitioners, and is outside this Court's jurisdiction. Moreover, this Court expressly rejected the Solicitor General's interpretation of the statute in *Kircher v. Putnam Funds Trust*, 547 U.S. 633 (2006). *See* Part II, *infra*.

The Petition should be denied.

I. Certiorari Should Be Denied With Respect To The Question Presented.

Everyone agrees that the Question Presented is not the subject of any disagreement between the state or federal appellate courts. *E.g.*, CVSG Br. 18. In fact,

only a single court of appeals – a California intermediate appellate court, in a ruling that is not even binding elsewhere in that one state – has decided the issue, ever. *Luther v. Countrywide Fin. Corp.*, 125 Cal. Rptr. 3d 716 (Cal. App. 2011), *cert. denied*, 565 U.S. 1080. That ordinarily would be reason enough to deny review.

The Solicitor General agrees with petitioners that the Question Presented can sometimes evade review in *federal* cases, because Congress has limited appeals of orders granting or denying remand to state court. CVSG Br. 18. That argument is substantially overstated. *See* BIO 11. For example, right now there is a "case pending in a federal court of appeals that raises the question whether Section 77v(a) eliminated state courts' concurrent jurisdiction over covered class actions raising only 1933 Act claims," in which briefing is nearly completed and the court of appeals specifically denied a motion for judgment on the pleadings "for lack of jurisdiction." CVSG Br. 18-19 n.6 (citing *Ellis v. Natera, Inc., et al.*, No. 16-16576 (9th Cir. docketed Mar. 29, 2016)).

But none of that even matters. No matter how appeals might progress in the twelve regional circuits, there are fifty other straightforward pathways to review in this Court. In fact, the government's singular focus on federal appellate review of the Question Presented overlooks that the issue regularly arises in *state* – not federal – court; in fact, it *always* arises there in the first instance. If the Question Presented is actually recurring and important, it will return here so that certiorari may be granted in another case if and when a conflict emerges.

The Solicitor General also recognizes that the superior court in this case – consistent with the overwhelming majority of the courts that have considered the Question Presented – correctly held that SLUSA did not eliminate state courts' concurrent jurisdiction over claims under the 1933 Securities Act. The state courts "correctly held that SLUSA did not divest it of jurisdiction over respondents' 1933 Act suit." CVSG Br. 6. Petitioners dispute that reading (Pet. Supp. Br. 8-10), but it is correct for the reasons set forth at length by both the government and respondents (BIO 16-22); there is no reason to repeat them again now for a third time. The judgment in the case thus does not represent a legal error that would otherwise weigh in favor of granting review.

Just as important, although the Question Presented has given rise to some disagreement among trial courts, the balance of rulings is entirely lopsided in respondents' favor. *See* BIO 12. The Solicitor General notes that some inconsistency remains, citing a single decision last year in Delaware. CVSG Br. 18. But again, the government's argument for granting certiorari on that basis sweeps far too widely. Thousands, if not tens of thousands, of legal questions are the subject of such thin disagreements among trial courts.

Certiorari accordingly should be denied with respect to the Question Presented.

II. Certiorari Should Be Denied With Respect To The Proper Construction Of The Removal Provision Of Section 77p(c).

A. The Interpretation Of Section 77p(c) Is Not Properly Before The Court.

The Solicitor General opines that this case hypothetically could have been removed to federal district court under Section 77p(c). CVSG Br. 13-17. But for four reasons – each independently sufficient – this Court cannot decide that issue in this case. To the extent the government's reading of the statute has merit, it is an important reason to *deny* certiorari and grant review instead in a later case in which the issue is properly presented. The benefits of waiting are particularly acute given that this issue is not yet the subject of any conflict in the lower courts; the existing thin disagreement among trial courts extends only to the discrete interpretation of "Section 77v(a)'s 'except' clause." *Id.* 17.

First, the Question Presented does not encompass whether this case could have been removed under Section 77p(c). Instead, the question is "[w]hether state courts lack subject matter jurisdiction over covered class actions that allege only '33 Act claims." Pet. i. Nor is the issue the Solicitor General would introduce otherwise lurking below the Petition's surface. Not even petitioners in their Supplemental Brief suggest that it is. There is only one "provision directly at issue in this case, 15 U.S.C. 77v(a)." CVSG Br. 6.

The Petition and Reply Brief do not contain any material discussion of Section 77p(c). Together, they cite that provision only a single time: for the purpose

of *rejecting* it as an independent basis for removal. The Petition thus explains that removal under Section 77p(c) is limited to cases that are subject to dismissal under Section 77p(b) – precisely the argument the Solicitor General rejects. Pet. 7 ("SLUSA also precluded covered class actions alleging state-law securities claims, *see* 15 U.S.C. § 77p(b), and permitted *such precluded actions* to be removed to and dismissed in federal court, *see id.* § 77p(c)." (emphasis added)). As explained by the Solicitor General, "Petitioners contend (*e.g.*, Pet. 25, 27) that, unless Section 77v(a)'s 'except' clause is read to divest state courts of jurisdiction over 1933 Act suits like these, SLUSA cannot achieve its purpose of preventing circumvention of the PSLRA's substantive and procedural requirements." *Id.* 13. But according to the Solicitor General, the argument set forth by the Petition is "wrong." *Id.*

Second, petitioners did not seek to remove the case under Section 77p(c). Instead, "[p]etitioners moved for judgment on the pleadings for lack of subject-matter jurisdiction." CVSG Br. 4; *see also id.* 20. As the Solicitor General finally acknowledges in a footnote, "Because petitioners did not seek to remove this case to federal court, but instead asked the state court to dismiss on jurisdictional grounds, the question whether removal under Section 77p(c) would have been permissible is not squarely presented here." *Id.* 15 n.3. And by "not squarely," the government understates petitioners' complete failure to raise the issue.

Moreover, as in the Petition, petitioners repeatedly argued in the state courts that Section 77p(c) is not an independent basis to remove this case.

Petitioners did not merely "ignore" SLUSA's exception to the removal prohibition. *Contra id.* 13. They affirmatively argued it was not an independent basis for removal. *See, e.g.*, Memorandum of Points and Authorities in Support of Cyan Defendants' Motion for Judgment on the Pleadings for Lack of Subject Matter Jurisdiction 10-11 (filed Aug. 25, 2015); Cyan Defendants' Reply in Support of Their Motion for Judgment on the Pleadings for Lack of Subject Matter Jurisdiction 1-2 (filed Oct. 16, 2015).

Third, not only was this issue not "pressed" by petitioners below, *see supra*, it also was not "passed upon" by any of the lower courts. It is therefore not subject to review in this Court. *See Clark v. Jeter*, 486 U.S. 456, 459-60 (1988). The trial court did not discuss whether Section 77p(c) was an independent basis for jurisdiction. Neither did the unexplained denials of the writ by the state court of appeals and supreme court.

Fourth, and most stark, this Court lacks jurisdiction to decide the issue. The Solicitor General argues – and petitioners now agree, reversing their prior position (Pet. Supp. Br. 4 n.1) – that jurisdiction exists in this Court because petitioners' request for a writ in the state appellate courts constitutes an independent judicial proceeding that is itself now "final." The Solicitor General argues that this Court has jurisdiction to review the "original proceeding initiated by the petition" for a writ in the state courts. CVSG Br. 20. But that point is fatal to the argument that this Court may determine whether petitioners could properly remove this case to federal district court under Section 77p(c). That is so because "that petition initiated an original proceeding on the topic of

the trial court's jurisdiction." *Id.* (emphasis added). The independent state court proceeding that supposedly is the basis for this Court's jurisdiction was thus strictly limited to whether the state courts could decide respondents' suit. It had nothing to do with the government's position that, assuming the state courts possess concurrent jurisdiction, petitioners nonetheless could have removed it to federal district court under Section 77p(c).[1]

Essentially ignoring all four independent barriers to review, the Solicitor General suggests that this Court should grant certiorari to "provide helpful guidance to lower courts about the scope of Section 77p(c)'s removal authorization." *Id.* 15 n.3. The government reasons that in deciding the Question Presented, "the Court could and should consider the structure and purposes of the overall statutory scheme." *Id.* That would undermine every accepted limitation on this Court's jurisdiction. On that view, whenever a case addresses one statutory provision (essentially every statutory case) the Court is free to decide the meaning of every related collateral provision, even when it lies outside the Question Presented, was disavowed below, contradicts the

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[1] The Solicitor General confesses some "doubt" and "uncertainty" about whether the ruling below is the subject of a final judgment subject to review in this case, because there is no way to know whether the state court of appeals and supreme court denied the writ on federal or instead state-law grounds. CVSG Br. 19, 21. In particular, the court of appeal and supreme court did *not* hold that the trial court possessed jurisdiction; they did not hold anything *at all*. There is every reason to believe that those courts denied the writ on the ground that, for example, review would be more appropriate after a final judgment in the case.

essential theory of the petitioners, was neither pressed in nor passed upon by the lower courts, and is outside this Court's jurisdiction. That argument answers itself.

B. The Solicitor General's Interpretation Of Section 77p(c) Lacks Merit.

The statutory text plainly authorizes the removal of only cases "based upon the statutory or common law of any State or subdivision thereof." 15 U.S.C. § 77p(b). Because this case is instead based only on the 1933 Securities Act, it is not subject to removal.

Three interlocking provisions are at issue.

First, the 1933 Act's anti-removal provision, Section 77v(a), provides: "Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States."

Second, the cross-referenced Section 77p(c) provides: "Any covered class action brought in any State court involving a covered security, *as set forth in subsection (b)*, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b)" (emphasis added).

Third, the incorporated Section 77p(b) provides: "No covered class action *based upon the statutory or common law of any State or subdivision thereof* may be maintained in any State or Federal court by any party alleging" fraud (emphasis added).

Thus, Section 77v(a) prohibits removal except for suits described in subsection (b), which are those arising under state law.

Indeed, the Solicitor General's brief elsewhere makes this very point. The government explains:

> By its terms, [Section 77p(b)] provision addresses *only certain class actions brought under state law*, and it has no meaningful application to the 1933 Act suits that are referenced in Section 77v(a). Moreover, Section 77p(b) precludes both state and federal courts from hearing the specified state-law class actions. *Section 77p(b) therefore does not limit the concurrent state-court jurisdiction over 1933 Act claims that Section 77v(a) generally provides.*

CVSG Br. 7 (quoting 15 U.S.C. § 77p(b) (second and third emphases added)). Petitioners themselves explain that the Solicitor General's reading of Section 77p(c) cannot be reconciled with the government's own understanding that Section 77p(b) is limited to state law suits. *See* Pet. Supp. Br. 8-10.

Indeed, this Court rejected the Solicitor General's interpretation in *Kircher v. Putnam Funds Trust*, 547 U.S. 633 (2006). There, the Court held that an order remanding a securities class action to state court is not appealable. The Court reasoned that removal under Section 77p(c) is "limited to those precluded by the terms of subsection (b)." *Id.* at 642; *see also* CVSG Br. 16 (*Kircher* "stat[es] that 'removal jurisdiction under subsection (c)' should be 'understood to be restricted to precluded actions defined by subsection (b)" (quoting 547 U.S. at 643-44)). That reading of the statute is irreconcilable with the government's position that

Section 77p(c) authorizes the removal of suits brought under the 1933 Securities Act that are not precluded from state court jurisdiction under subsection (b).

The Solicitor General responds that, in the course of reaching that conclusion, *Kircher* also "stated that removal under Section 77p(c) is 'confined to cases 'set forth in subsection (b),' namely, those with claims of untruth, manipulation, and so on.'" CVSG Br. 15 (quoting 547 U.S. at 642). But that sentence is completely consistent with the Court's holding that removal is not independently authorized for cases that are not excluded from state court jurisdiction.

Moreover, the government's reading is "inconsistent with SLUSA's overall structure and purposes." CVSG Br. 9. SLUSA is directed at "'State private securities class action lawsuits'" that would otherwise evade the strict pleading requirements introduced by the Private Securities Litigation Reform Act. *Id.* 2 (quoting SLUSA § 2(5)). SLUSA is not directed at federal law suits such as this one brought under the 1933 Act. The Solicitor General essentially recognizes that fact in concluding that SLUSA preserves the state courts' concurrent jurisdiction over suits under the 1933 Act. CVSG Br. 8-9.

The Solicitor General's only contrary argument is that Congress "would not likely have denied defendants access to a federal forum for adjudication of the merits of analogous 1933 Act claims." *Id.* 14. There is no support for that contention, and the government cites nothing at all in support of it. As the Solicitor General elsewhere explains, *see supra*, SLUSA is targeted at prohibiting altogether state law suits that are in substance federal securities fraud class actions by another name. It is not concerned

with claims under the 1933 Act. Congress has long granted state courts jurisdiction over those claims; SLUSA does not strip that jurisdiction.

Because the Solicitor General's reading of Section 77p(c) is both irreconcilable with the statutory text and precluded by *Kircher*, there is no reason to discard this Court's ordinary jurisdictional principles to decide that issue in this case in which it is not properly presented.

CONCLUSION

For the foregoing reasons and those set forth in the Brief in Opposition, certiorari should be denied.

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No. 15-1439

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

Respondents respectfully submit this Supplemental Brief to respond directly to three new assertions in the Petitioners' Reply Brief.

At page 18, petitioners refer to a purported "dramatic increase in class-action filings in California" under the Securities Act of 1933. That is inaccurate. Petitioners are relying on an isolated uptick in the number of suits filed in 2016. "In the first half of 2017, there were four [such] cases brought in California state courts, distinctly fewer than observed in either the first or second halves of 2016." Cornerstone Research, *Securities Class Actions Filings – 2017 Midyear Assessment* at 4 (2017). The annual average for such filings from 2010-2016 was six. *Id.*

At page 22, petitioners attempt to deny the existence of "*any* 1933 Act class action filed in state court until the Reform Act was passed, when—as [respondents] acknowledge, Resp. Br. 28—such cases suddenly emerged." That is doubly inaccurate. Appendix A to this Supplemental Brief includes a sampling of the state court class actions asserting claims under the 1933 Act prior to the enactment of the Reform Act. Further, our opening brief made exactly the opposite point from the one petitioners represent: "In contrast with the uptick in *state law* securities fraud filings after the PSLRA, petitioners have not presented any comparable evidence that the enactment of the [Reform Act] spurred more [1933 Act] securities class actions in state court." Resp. Br. 28 (emphasis added).

At page 24 n.5, petitioners attempt to suggest that they did not seek to remove this case from state to

federal court out of a fear of being sanctioned. That cannot be accurate. Appendix B to this Supplemental Brief includes a sampling of the many cases in which defendants sought to remove such matters from state to federal court in the relevant time period. The one isolated example petitioners cite in their brief involved a single specific defendant that repeatedly sought to engage in futile removals.

CONCLUSION

This Court should affirm the decision below.

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November 22, 2017

APPENDIX A

Steigman v. Beery, 203 A.2d 463, 468 (Del. Ch. 1964) (declining to dismiss hybrid state court class action asserting state law claims and a claim under the Securities Act of 1933 with prejudice on the basis of the stipulation of settlement);

Jennings v. Roberts Scott & Co., 546 P.2d 343, 345 (Ariz. 1976) (reversing and remanding dismissal of hybrid state court class action asserting claims under the Securities Act of 1933 and the Arizona Securities Act);

Lurie v. Canadian Javelin Ltd., 443 N.E.2d 592, 593 (Ill. 1982), *abrogated by Brundidge v. Glendale Fed. Bank, F.S.B.*, 659 N.E.2d 909 (Ill. 1995) (remand for reconsideration of attorney fees award in hybrid state court class action asserting common law fraud, violation the Illinois Securities Law of 1953, and violations of sections 5 and 17(a) of the Securities Act of 1933);

Drexel Burnham Lambert, Inc. v. Merchants Inv. Counseling, Inc., 451 N.E.2d 346 (Ind. Ct. App. 1983) (affirming denial of motion to dismiss hybrid state court class action asserting violations of section 11 of the Securities Act of 1933 and violations of Indiana securities law);

Kurgan v. Boise, Class Action Complaint, Civil No. CA000863, at 33-39 (Cal. Super. Ct., July 12, 1984) (hybrid state court class action asserting claims under section 17 of the Securities Act of 1933, state law fraud claims, and claims for violation of the California Corporations Code);

Norcott v. Haney, Amended Class Action Complaint, Civil No. 125191, at 37-44 (Cal. Super. Ct., May 1, 1986) (hybrid state court class action asserting claims under section 17 of the Securities Act of 1933, state law fraud claims, and claims for violation of the California Corporations Code);

In re Technical Equities Secs. Litig., First Consolidated Amended Class Action Complaint, Master File No. 595215, at 60-75 (Cal. Super. Ct., June 2, 1986) (hybrid state court class action asserting claims under sections 11, 12, 15 and 17 of the Securities Act of 1933 Act, state law fraud claims, breach of fiduciary duty claims, RICO claims, and claims for violation of the California Corporations Code);

Engel v. Elsner, Class Action Complaint, Civil No. CA000991, at 39-44 (Cal. Super. Ct., July 8, 1986) (hybrid state court class action asserting claims under section 17 of the Securities Act of 1933, state law fraud claims, and claims for violation of the California Corporations Code);

Harris v. Union Electric Co., 1988 Mo. App. LEXIS 58 (Mo. App. Ct. 1988) (affirming judgment for plaintiffs in state court class action asserting claims under section 17 of the Securities Act of 1933 and section 323(a) of the Trust Indenture Act of 1939);

Abbey v. Allergan, Inc., Civil No. 602236, Class Action Complaint, at 8-13 (Cal. Super. Ct., Sept. 12, 1989) (hybrid state court class action asserting claims under sections 11 and 15 of the Securities Act of 1933, state law fraud claims, and claims for violation of the California Corporations Code);

Norman v. Paco Pharmaceutical Services, Inc., Civil Action No. 10417, Memorandum Opinion, 1989 Del Ch. LEXIS 131, at *28-*33 (Del. Ch. Sept. 22, 1989) (denying motion to dismiss certain claims in hybrid state court class action asserting violations of sections 11 and 12 of the Securities Act of 1933, as well as state law fraud, negligent misrepresentation, breach of fiduciary duty, and breach of contract claims);

Porter v. Texas Commerce Bancshares, Inc., 1989 Del. Ch. LEXIS 130 (Del. Ch. Oct. 12, 1989) (denying motion to dismiss hybrid state court class action asserting claims under Securities Act of 1933 and claims under state corporation code);

Donaldson Lufkin & Jenrette Sec. Corp. v. Star Techs., Inc., 561 N.Y.S.2d 371 (Sup. Ct. 1990), on reargument, 567 N.Y.S.2d 1002 (Sup. Ct. 1991), and aff'd, 580 N.Y.S.2d 657 (1992), and aff'd, 580 N.Y.S.2d 657 (1992) (denying motion for summary judgment of hybrid state court class action asserting violations of sections 11 and 12 of the Securities Act of 1933 and common law claims);

In re Union Square Assoc. Sec. Litigation, 1990 Del. Ch. LEXIS 207 (Del. Ch. Dec. 18, 1990) (approving settlement of hybrid state court class action asserting claims under sections 11 and 12 of the Securities Act of 1933 as well as state fraud and negligent misrepresentation claims);

Wyly v. Mazzafo, 1991 Del. LEXIS 307 (Del. 1991) (denying interlocutory appeal from order granting in part and denying in part motion to dismiss hybrid state court class action asserting claims under section 12 of the Securities Act of 1933 and state breach of fiduciary duty claims);

In re USACafes, L.P. Litig., 600 A.2d 43, 46 (Del. Ch. 1991) (denying in part and granting in part motion to dismiss claims in state court class action asserting violations of sections 11 and 12 of the Securities Act of 1933, as well as state law claims involving breach of fiduciary duty);

Mann v. Kemper Fin. Cos., No. 1-90-0282, Opinion, 618 N.E.2d 317, 321-322 (Ill. App. Ct., Dec. 30, 1992) (affirming in part and reversing in part dismissal of complaint for failure to state claim in hybrid state court class action asserting violations of sections 11 and 12 of the Securities Act of 1933, as well as state law fraud, breach of fiduciary duty, and accounting claims);

Branson v. Exide Elecs. Corp., No. 457, Opinion, 1994 Del LEXIS 129, at *9-*10 & n.2 (Del. Apr. 25, 1994) (reversing and remanding case to Delaware Chancery Court on dismissal of complaint for failure to state claim in hybrid state court class action asserting violations of sections 11 and 12 of the Securities Act of 1933, as well as state law breach of fiduciary duty claims);

Glosser v. Cellcor, Inc., Civil Action No. 12725, Memorandum Opinion, 1995 Del. Ch. LEXIS 16, at *1-*2, *16-*19 (Del. Ch. Mar. 10, 1995) (certifying certain class claims in hybrid state court class action asserting violations of sections 11 and 12 of the Securities Act of 1933, as well as state law fraud and negligent misrepresentation claims).

APPENDIX B

Rajasekaran v. CytRx Corp., No. CV 14-3406-GHK (PJWx), 2014 WL 4330787 (C.D. Cal. Aug. 21, 2014);

Plymouth Cty. Ret. Sys. v. Model N, Inc., No. 14-cv-04516-WHO, 2015 WL 65110 (N.D. Cal. Jan. 5, 2015);

Rosenberg v. Cliffs Nat. Res., Inc., No. 1:14CV1531, 2015 WL 1534033 (N.D. Ohio Mar. 25, 2015);

City of Birmingham Ret. & Relief Sys. v. MetLife, Inc., No. 2:12-CV-2626-SLB, 2015 WL 4385277 (N.D. Ala. Mar. 31, 2015);

Pac. Inv. Mgmt. Co. LLC v. Am. Int'l Grp., Inc., No. SA CV 15-0687-DOC, 2015 WL 3631833 (C.D. Cal. June 10, 2015);

Liu v. Xoom Corp., No. 15-CV-00602-LHK, 2015 WL 3920074 (N.D. Cal. June 25, 2015);

City of Warren Police & Fire Ret. Sys. v. Revance Therapeutics, Inc., 125 F. Supp. 3d 917 (N.D. Cal. 2015);

Schneider v. MobileIron, Inc., No. 3:15-cv-04404-VC, Order granting Motion to Remand (N.D. Cal. Nov. 30, 2015);

Buelow v. Alibaba Grp. Holding Ltd., No. 15-cv-05179-BLF, 2016 WL 234159 (N.D. Cal. Jan. 20, 2016);

Carlson v. Ovascience, Inc., No. 15-14032-WGY, 2016 WL 2650707 (D. Mass. Feb. 23, 2016);

Badri v. Terraform Glob., Inc., No. 15-cv-06323-BLF, 2016 WL 827372 (N.D. Cal. Mar. 3, 2016);

Fraser v. Wuebbels, No. 15-cv-06326-BLF, 2016 WL 827373 (N.D. Cal. Mar. 3, 2016);

Iron Workers Mid-S. Pension Fund v. Terraform Glob., Inc., No. 15-cv-6328-BLF, 2016 WL 827374 (N.D. Cal. Mar. 3, 2016);

Patel v. Terraform Glob., Inc., No. 16-cv-00073-BLF, 2016 WL 827375 (N.D. Cal. Mar. 3, 2016);

Fortunato v. Akebia Therapeutics, Inc., 183 F. Supp. 3d 326 (D. Mass. 2016);

Elec. Workers Local #357 Pension & Health & Welfare Trs. v. Clovis Oncology, Inc., 185 F. Supp. 3d 1172 (N.D. Cal. 2016);

Carlson v. Ovasci., Inc., 189 F. Supp. 3d 185 (D. Mass. 2016);

Pytel, et al. v. Sunrun Inc., et al., No. C 16-2566-CRB,C, 2016 U.S. Dist. LEXIS 90417 (N.D.Cal. July 12, 2016);

Rivera v. Fitbit, Inc., No. 16-cv-02890-SI, 2016 WL 4013504 (N.D. Cal. July 27, 2016);

Westmoreland Cnty Emp. Ret. Fund v. Inventure Foods Inc., No. CV-16-01410-PHX-SMM (D.Ariz. Aug. 11, 2016);

Public Emp. Ret. Sys. of Miss. v. Sprouts Famers Market Inc., No. CV-16-008115-PHX-ROS (D. Ariz. Mar. 27, 2017);

Nat'l Shopmen Pension Fund v. Ally Fin. Inc., 2017 U.S. Dist. LEXIS 85242 (E.D. Mich. May 26, 2017).

No. 15-1439

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v.

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RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the opening brief for petitioners remains accurate.

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Respondents' supplemental brief is manifestly improper under this Court's Rule 25.6, and petitioners have filed a letter with the Clerk of the Court asking that it be stricken. In the event that the Court considers the filing, it is also wrong. In a single page, respondents make three assertions, and each one is misleading or false.

First, respondents claim that there has not been a "dramatic increase" in the number of 1933 Act class actions filed in California since the California Court of Appeal first permitted such suits in *Luther* v. *Countrywide Financial Corp.*, 195 Cal. App. 4th 789 (2011). This point is not open to debate. The petition for certiorari included a chart listing every 1933 Act class action filed in California since SLUSA, *see* Pet. App. 30-31, and the Appendix to this brief reproduces and updates that chart. As the data make clear, in the twelve years between SLUSA and *Countrywide*, plaintiffs filed a total of eleven 1933 Act class actions in California state courts, or an average of 0.9 per year. In the six years since *Countrywide*, plaintiffs have filed 53 such suits in California courts, averaging 8.8 per year—that is, a roughly *ninefold* increase. In 2017 alone, plaintiffs filed six suits, more than in the first eight years after SLUSA combined.

Respondents also assert that petitioners were incorrect in stating that "respondents have not identified *any* 1933 Act class action filed in state court until the Reform Act was passed." Reply Br. 22. That statement was unquestionably accurate when petitioners made it: Respondents identified no such

cases in their certiorari-stage or merits briefing, and they do not claim otherwise. Moreover, the statement remains accurate. In their supplemental brief, respondents belatedly identify a number of *mixed cases* filed in state court in the decades prior to the Reform Act. *See* Supp. Br. 1a-4a (listing cases raising both federal securities claims and state-law claims alleging false statements or deceptive conduct). But respondents themselves believe that SLUSA withdraws state-court jurisdiction over mixed cases. Resp. Br. 10. What respondents have not turned up—even after their apparently exhaustive search—is a *single* exclusively 1933 Act class action filed in state court before the Reform Act, let alone a significant number of such actions. Since those are the only cases that petitioners' reading would divest state courts of jurisdiction to hear, respondents' supplemental brief powerfully confirms that adopting petitioners' interpretation would not disturb states' preexisting authority in any meaningful respect. *See* Reply Br. 22.

Finally, respondents suggest that petitioners had no reason to fear sanctions for seeking removal because other defendants sought removal in the same time period and escaped consequences. That cavalier assertion is without merit. Judges in the relevant jurisdiction repeatedly warned that, in light of the unbroken wall of state-court authority deeming removal unlawful, there was no "objectively reasonable basis" for defendants to ask for removal. *E.g.*, *Elec. Workers Local #357 Pension* v. *Clovis Oncology, Inc.*, 185 F. Supp. 3d 1172, 1180 n.6 (N.D. Cal. 2016); *see Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 141 (2005) (except in "unusual circumstances," fees should be awarded against a party that

seeks removal without an "objectively reasonable basis"). Given that defendants have been sanctioned for pursuing removal nonetheless, petitioners reasonably declined to test the courts' warnings themselves.

CONCLUSION

Respondents' supplemental brief should be stricken, and the judgment below should be reversed.

Respectfully submitted,

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NOVEMBER 27, 2017

APPENDIX

CLASS ACTIONS ALLEGING CLAIMS ONLY UNDER THE 1933 ACT, FILED IN CALIFORNIA STATE COURTS

***Countrywide* (May 18, 2011) – present:**

	Filing Date	Case Name	Case No.
1.	Sep. 20, 2017	Clayton v. Tintri, Inc.	San Mateo County 17CIV04312
2.	Aug. 11, 2017	Guo v. ZTO Express (Cayman) Inc.	San Mateo County 17CIV03676
3.	May 23, 2017	Simpson v. Snap Inc.	Los Angeles County BC662444
4.	May 22, 2017	Grotewiel v. Avinger, Inc.	San Mateo County 17CIV02240
5.	May 22, 2017	Bucks County Employees Retirement Fund v. NantHealth, Inc.	Los Angeles County BC662330
6.	Feb. 10, 2017	Ng v. Kitov Pharmaceuticals Holdings, Ltd.	San Mateo County 17CIV00620
7.	Nov. 18, 2016	Book v. ProNAi Therapeutics, Inc.	San Mateo County 16CIV02473
8.	Nov. 4, 2016	Hosey v. Costolo (Twitter, Inc.)	San Mateo County 16CIV02228

9.	Sep. 20, 2016	Jackie888, Inc. v ReWalk Robotics Ltd.	San Mateo County 16CIV01454
10.	Sep. 1, 2016	Ramsay v. Pure Storage, Inc.	San Mateo County 16CIV01183
11.	Aug. 19, 2016	Jackie888, Inc. v. Tokai Pharmaceuticals, Inc.	San Francisco County CGC-16-553796
12.	Aug. 11, 2016	Bloom v. Goldman, Sachs & Co. (SunEdison, Inc.)	San Mateo County 16CIV00884
13.	Aug. 5, 2016	Torres v. Kryeziu (Code Rebel Corporation)	Los Angeles County BC629838
14.	May 20, 2016	Wagner v. NantKwest, Inc.	Los Angeles County BC621292
15.	Apr. 28, 2016	Rivera v. Fitbit, Inc.	San Mateo County CIV538403
16.	Apr. 19, 2016	Braun v. NRG Yield, Inc.	Kern County BCV-16-100867
17.	Apr. 13, 2016	Pytel v. Sunrun Inc.	San Mateo County CIV538215
18.	Apr. 4, 2016	Bloom v. SunEdison, Inc.	San Mateo County CIV538022
19.	Mar. 17, 2016	Beck v. Apigee Corporation	San Mateo County CIV537817
20.	Feb. 26, 2016	Geller v. LendingClub Corporation	San Mateo County CIV537300

21.	Feb. 17, 2016	City of Warren Police and Fire Retirement System v. Natera, Inc.	San Mateo County CIV537409
22.	Jan. 25, 2016	Giavara v. GoPro, Inc.	San Mateo County CIV537077
23.	Jan. 22, 2016	Electrical Workers Local #357 Pension And Health & Welfare Trusts v. Clovis Oncology, Inc.	San Mateo County CIV537068
24.	Jan. 14, 2016	Barnett v. Ooma, Inc.	San Mateo County CIV536959
25.	Dec. 7, 2015	Beaver County Employees Retirement Fund v. Avalanche Biotechnologies, Inc.	San Mateo County CIV536488
26.	Dec. 1, 2015	Rezko v. XBiotech Inc.	Los Angeles County BC602793
27.	Nov. 19, 2015	Kleiman v. Sientra, Inc.	San Mateo County CIV536313
28.	Oct. 23, 2015	Fraser v. Wuebbels (TerraForm Global, Inc.)	San Mateo County CIV535963
29.	Oct. 5, 2015	Buelow v. Alibaba Group Holding Limited	San Mateo County CIV535692
30.	Aug. 24, 2015	Steinberg v. MobileIron, Inc.	Santa Clara County 1-15-CV-284761
31.	Aug. 11, 2015	Shen v. TrueCar, Inc.	Los Angeles County BC590999
32.	July 21, 2015	Cervantes v. Dickerson (Etsy, Inc.)	San Mateo County CIV534768

33.	June 2, 2015	Hunter v. Aerohive Networks, Inc.	San Mateo County CIV534070
34.	May 1, 2015	City of Warren Police and Fire Retirement System v. Revance Therapeutics, Inc.	San Mateo County CIV533635, transferred on Nov. 6, 2015 to Santa Clara County 15-CV-287794
35.	Apr. 2, 2015	Firerock Global Opportunity Fund LP v. Castlight Health, Inc.	San Mateo County CIV533203
36.	Mar. 20, 2015	O'Donnell v. Coupons.com, Inc.	Santa Clara County 1-15-CV-278399
37.	Mar. 17, 2015	Debotte v. King Digital Entertainment PLC	San Francisco County CGC-15-544770
38.	Jan. 29, 2015	City of Warren Police and Fire Retirement System v. A10 Networks, Inc.	Santa Clara County 1-15-CV-276207
39.	Jan. 6, 2015	Liu v. Xoom Corp.	San Francisco County CGC-15-543531
40.	Oct. 16, 2014	Berliner v. Pacific Coast Oil Trust	Los Angeles County BC560944
41.	Sep. 5, 2014	Plymouth County Retirement System v. Model N, Inc.	San Mateo County CIV530291
42.	June 20, 2014	In re FireEye, Inc. Securities Litigation	Santa Clara County 1-14-CV-266866

43.	Apr. 3, 2014	Rajasekaran v. CytRx Corp.	Los Angeles County BC541426
44.	Apr. 1, 2014	Beaver County Employees Retirement Fund v. Cyan, Inc.	San Francisco County CGC-14-538355
45.	July 10, 2013	Desmarais v. Johnson (CafePress Inc.)	San Mateo County CIV522744
46.	Oct. 19, 2012	Toth v. Envivio, Inc.	San Mateo County CIV517481
47.	Sept. 13, 2012	Robinson v. Audience, Inc.	Santa Clara County 1-12-CV-232227
48.	Aug. 1, 2012	Reyes v. Zynga Inc.	San Francisco County CGC-12-522876
49.	May 30, 2012	Lapin v. Facebook, Inc.	San Mateo County CIV514240
50.	Mar. 13, 2012	Marcano v. Nye (Zeltiq Aesthetics, Inc.)	Alameda County RG12621290
51.	Oct. 21, 2011	Young v. Pacific Biosciences of California, Inc.	San Mateo County CIV509210
52.	Sept. 27, 2011	Harper v. Smart Technologies, Inc.	San Francisco County CGC-11-514673
53.	July 1, 2011	West Virginia Laborers' Trust Fund v. STEC, Inc.	Orange County 30-2011-00489022

SLUSA (Nov. 3, 1998) - *Countrywide* (May 18, 2011):

	Filing Date	Case Name	Case No.
1.	Jan. 20, 2009	IBEW Local 103 v. IndyMac MBS Inc.	Los Angeles County BC405843
2.	Dec. 5, 2008	Connecticut Carpenters Pension Fund v. Merrill Lynch	Los Angeles County BC403282
3.	Dec. 2, 2008	Public Employees' Retirement System of Mississippi v. Morgan Stanley	Orange County No. 30-2008 00226005
4.	Dec. 19, 2008	Swiskay v. Wachovia Corp.	Alameda County RG08426378
5.	Apr. 15, 2008	Layne v. Countrywide Financial Corp.	Los Angeles County BC389208
6.	Nov. 14, 2007	Luther v. Countrywide Home Loans Servicing LP	Los Angeles County BC380698
7.	July 29, 2005	Purowitz v. DreamWorks Animation SKG, Inc.	Los Angeles County BC337475
8.	Mar. 9, 2005	Pipefitters Local 552 and 633 Pension Trust Fund v. Salem Communications Corp.	Ventura County CIV232456
9.	May 9, 2003	Valuepoint Partners, Inc., v. ICN Pharmaceuticals, Inc.	No.: 03CC00180
10.	Mar. 11, 2003	Hawaii Structural Ironworkers Pension Trust Fund v. Calpine Corp.	San Diego County GIC806973
11.	Sept. 23, 2002	Brody v. Homestore, Inc.	Los Angeles County BC281956

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RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the petition for a writ of certiorari remains accurate.

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SUPPLEMENTAL BRIEF FOR PETITIONERS

INTRODUCTION

Petitioners and the United States see eye to eye on the need for this Court's review in this case. As the United States explains, the question presented has generated substantial confusion in the lower courts, and this is the right case for resolving it. Indeed, any objection to this case as a proper vehicle is unfounded: The original proceeding that petitioners initiated in the California Court of Appeal resulted in a final judgment based on federal law, which this Court has jurisdiction to review.

Petitioners and the United States do part ways on the merits. While petitioners maintain that the Securities Litigation Uniform Standards Act

(SLUSA) divests state courts of jurisdiction over covered class actions alleging only claims under the Securities Act of 1933 (1933 Act), the United States contends that SLUSA merely authorizes a subset of such actions to be removed to federal district court. But even on the United States' account, many district courts are misapplying SLUSA, remanding certain covered class actions to state court that should remain in federal court. *See, e.g.*, *Elec. Workers Local #357 Pension & Health & Welfare Trs.* v. *Clovis Oncology, Inc.*, 185 F. Supp. 3d 1172, 1176, 1177-1178 (N.D. Cal. 2016). This Court's review is therefore necessary to resolve, once and for all, the legal debate over where covered class actions alleging only 1933 Act claims should be heard.

The petition for certiorari should be granted.

ARGUMENT

I. THE UNITED STATES AGREES THAT CERTIORARI SHOULD BE GRANTED IN THIS CASE

The United States agrees that the question presented warrants this Court's review, and that this case is an appropriate vehicle for that review. U.S. Br. 17-22. Certiorari should be granted.

1. The brief filed by the United States reiterates what petitioners have maintained all along: The question presented meets all the criteria of an issue meriting this Court's review. The question presented arises with "frequency." *Id.* at 19; *see* Reply to Br. in Opp. 1. It is the subject of "substantial" and "ongoing confusion in the lower courts." U.S. Br. 17, 19; *see* Pet. App. 25a-28a; Reply to Br. in Opp. App. 1a. And given the "significant obstacles to appellate resolution of the question presented," U.S. Br. 18,

there is no point in waiting for "a conflict among federal courts of appeals or state courts of last resort." *Id.* at 19; *see* Pet. 13-15, 20; Reply to Br. in Opp. 1-3. Indeed, a circuit split is even less likely to develop now that district courts have begun sanctioning defendants for removing suits like this one to federal court. *See Iron Workers Mid-S. Pension Fund* v. *Terraform Glob., Inc.*, No. 15-cv-6328, 2016 WL 827374, at *5-6 (N.D. Cal. Mar. 3, 2016) (remanding the case and awarding attorney's fees and expenses to the plaintiff after finding that the defendants "lacked an objectively reasonable basis for seeking removal"). This case thus presents a rare opportunity to resolve "an important question of federal law that has not been, but should be, settled by this Court." U.S. Br. 19 (quoting S. Ct. R. 10(c)); *see* Pet. 10.

2. As the United States confirms, this case is also a proper vehicle for this Court's review.

a. The petition seeks review of a "[f]inal" state-court judgment under 28 U.S.C. § 1257(a). The United States correctly explains why, *see* U.S. Br. 19-21, and petitioners urge this Court to adopt that reasoning instead of the reasoning found in the petition and reply. Petitioners did not *appeal* the California Superior Court's decision denying their motion for judgment on the pleadings for lack of jurisdiction. Rather, they initiated an *original* proceeding in the California Court of Appeal by filing a petition for a writ of mandate, prohibition, or other relief. Pet. App. 15a, 32a. That distinct proceeding reached final judgment under Section 1257 when the Court of Appeal denied the petition and the Califor-

nia Supreme Court denied discretionary review. *Id.* at 15a-16a.[1]

This Court has made crystal clear that finality exists in these circumstances: "The proceeding for a writ of prohibition is a distinct suit, and the judgment finally disposing of it is a final judgment within the meaning of section 237(a) of the Judicial Code," the predecessor to Section 1257. *Bandini Petroleum Co.* v. *Superior Court*, 284 U.S. 8, 14 (1931); *see also Madruga* v. *Superior Court*, 346 U.S. 556, 557 n.1 (1954) ("The [California] Supreme Court's judgment finally disposing of the writ of prohibition is a final judgment reviewable here under 28 U.S.C. § 1257."); *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 565 (1947); Stephen M. Shapiro et al., *Supreme Court Practice* ch. 3.8, at 171-172 (10th ed. 2013). It makes no difference whether "further proceedings are to be had in the lower court"; "[a] judgment that terminates original proceedings in a state appellate court, in which the only issue decided concerns the jurisdiction of a lower state court, is final" all the same. *Fisher* v. *District Court*, 424 U.S. 382, 385 n.7 (1976) (per curiam). This Court therefore has jurisdiction under Section 1257 to review the judgment in this case.

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[1] In their certiorari petition and reply, petitioners mistakenly suggested that the California Court of Appeal denied discretionary appellate review in this case. *See* Pet. 16; Reply to Br. in Opp. 4. In filing a petition for a writ of mandate, prohibition, or other relief in the Court of Appeal, petitioners were initiating an original proceeding, not seeking discretionary appellate review. That is why the Superior Court itself was a respondent in the Court of Appeal and the California Supreme Court. Pet. ii. The Superior Court is also a respondent in this Court; the certiorari petition incorrectly said that it is not. *Id.*

b. That judgment, moreover, does not rest on any adequate or independent state ground. Though the Court of Appeal's summary order offers no explicit rationale, Pet. App. 15a, "other parts of the record" establish that the decision rested on the merits of the federal question presented here. Shapiro et al., *supra*, ch. 3.23, at 211, *quoted in Foster* v. *Chatman*, 136 S. Ct. 1737, 1746 n.3 (2016).

To begin, this Court should presume that the Court of Appeal's summary order rested on the same federal ground as the California Superior Court's decision. *See Foster*, 136 S. Ct. at 1746 n.3. *Ylst* v. *Nunnemaker*, 501 U.S. 797 (1991), is instructive. There, as here, a petition for an extraordinary writ was filed in a California appellate court, initiating an original proceeding. *Id.* at 800. The California appellate court denied the writ in a summary order without opinion. *Id.* This Court looked through to the "last *explained*" state-court judgment, *id.* at 805—a decision by a lower California court in a distinct proceeding, *id.* at 806—and presumed that the summary order rested on the same ground, *see id.* at 804.

Here, the last explained state-court judgment is the California Superior Court's decision. *See* Pet. App. 1a, 5a-6a. That decision rested entirely on *Luther* v. *Countrywide Financial Corp.*, 125 Cal. Rptr. 3d 716 (Ct. App. 2011), which in turn addressed only the federal question presented. Looking through to the Superior Court's decision, this Court should presume that the Court of Appeal's decision rested on the same federal ground. *See Shaw* v. *Superior Court*, 393 P.3d 98, 102-104 (Cal. 2017) (reaffirming that challenges to a California trial court's jurisdiction may be reviewed prior to trial by a petition for an extraordinary writ).

That presumption is strengthened by the substance of what the parties argued below. In the Court of Appeal, petitioners' memorandum in support of their petition for a writ of mandate, prohibition, or other relief addressed only the Superior Court's jurisdiction under SLUSA. *See* Pet. for a Writ of Mandate and/or Prohibition or Other Relief 17-35 (Dec. 2, 2015). Respondents did not file a response and thus did not inject any state-law issue. After the Court of Appeal denied the writ, petitioners filed a petition in the California Supreme Court, seeking review of only the federal question presented. *See* Pet. for Review 7-27 (Dec. 18, 2015). Notably, respondents' opposition addressed only that federal question, too. Answer to Pet. for Review 1-15 (Jan. 7, 2016). Thus, throughout this original proceeding, the California courts had only the federal question before them.

Given *Countrywide*, the Superior Court's decision, and the parties' arguments below, the record points to only one conclusion: that the judgment below rested on the federal question presented. This Court has previously exercised jurisdiction in similar circumstances. *See Mich. Cent. R.R.* v. *Mix*, 278 U.S. 492, 494 (1929) (exercising jurisdiction over the denial of an "application for a writ of prohibition * * * without an opinion"); *cf. Bd. of Educ.* v. *Superior Court*, 448 U.S. 1343, 1344, 1346 (1980) (Rehnquist, J., in chambers) (explaining that the Court "would in all probability have jurisdiction" to review the denial of a "petition for a writ of mandamus and/or prohibition" "without opinion"). It should do so again here. In the words of the United States, this case is an "appropriate" vehicle for review, U.S. Br. 22, and this Court is "unlikely to be presented" with a better one, *id.* at 19.

II. PETITIONERS' INTERPRETATION OF THE RELEVANT STATUTORY PROVISIONS IS STILL THE MOST NATURAL

On the merits, the United States contends that "the California trial court correctly held that SLUSA did not divest it of jurisdiction over respondents' 1933 Act suit." U.S. Br. 6. The United States insists, though, that 1933 Act suits like this one are not stuck in state court. *Id.* at 13. Rather, according to the United States, SLUSA permits such suits to be removed to federal court. *Id.* at 13-17.

As an initial matter, petitioners agree with the United States that, in resolving the question presented, the Court can consider the overall statutory scheme, including Sections 77p(b) and (c) and Section 77v(a)'s provisions regarding jurisdiction and removal. U.S. Br. 6; *see* 15 U.S.C. §§ 77p(b), 77p(c), 77v(a). All of those provisions are implicated by this case; the interpretation of any one provision is informed by the interpretation of the others. *See* U.S. Br. 15 n.3. This case thus presents the Court with an opportunity to fully resolve the legal debate over where covered class actions alleging only 1933 Act claims should be heard.

Petitioner also agree with the United States that "the efficac of [the Private Securities Litigation Reform Act's substantive and procedural] requirements depends on defendants' access to a federal forum." *Id.* at 13. By contrast, respondents maintain that if a suit like this one were filed in state court, it would be stuck there; it could be neither dismissed for lack of jurisdiction nor removed to federal court. *See* Br. in Opp. 16-17, 21-22. The United States' position at least has the virtue of

permitting some covered class actions alleging only 1933 Act claims to be removed to federal court—contrary to the decisions of numerous district courts. *See Elec. Workers Local #357*, 185 F. Supp. 3d at 1176, 1177-1178 (collecting cases).

But while the United States' reading of the relevant provisions is more faithful to the statutory scheme than respondents', it is still not the best reading. That is because the United States distorts the meaning of the "except" clause of Section 77v(a) and the section it cross-references, Section 77p. According to the United States, "[t]he 'except' clause makes clear that * * * state courts may not entertain any state-law claims barred by Section 77p(b)" in "hybrid class actions that contain both 1933 Act claims and state-law claims within the scope of Section 77p(b)." U.S. Br. 11-12. But as the United States acknowledges, the "except" clause is "a limit on the concurrent *jurisdiction* of *state* courts." *Id.* at 8 (emphases added); *see also* 15 U.S.C. § 77v(a) (addressing the concurrent "*jurisdiction*" of "*State* and Territorial courts" (emphases added)). Section 77p(b), by contrast, is about "*preclusion*." *Kircher* v. *Putnam Funds Tr.*, 547 U.S. 633, 636 n.1 (2006) (emphasis added). It "makes some state-law claims nonactionable," *id.*, whether brought in "State *or* Federal court," 15 U.S.C. § 77p(b) (emphasis added). The United States would thus employ a provision about *preclusion* in *any* court as the basis for an exception to *jurisdiction* in *state* court. Congress could not have meant to mix such apples and oranges. *See Kircher*, 547 U.S. at 646 (distinguishing "jurisdiction" from "preclusion"); U.S. Br. 7-8 (acknowledging that Section 77p(b) "does not limit the

concurrent state-court jurisdiction over 1933 Act claims that Section 77v(a) generally provides").[2]

Rather, what Congress meant to do is more straightforward: divest state courts of jurisdiction over "covered class actions" as defined in Section 77p. The United States objects that Section 77p itself does not "'provide[]' an exception to the general rule of concurrent jurisdiction." U.S. Br. 8. But what Section 77p does "provide[]" is a definition of "covered class actions." *See* 15 U.S.C. § 77p(f). And it is that definition that Congress intended to cross-reference when it divested state courts of jurisdiction over "covered class actions" "as provided in section 77p." *Id.* § 77v(a).[3]

In short, petitioners offer the most natural reading of the relevant statutory provisions: The "except"

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[2] The United States also says that the "except" clause might have been added "in a more general excess of caution, as a way of ensuring that nothing in the 1933 Act's general jurisdictional provision would be taken to supersede SLUSA's limits on state-court jurisdiction." U.S. Br. 12. It is unclear what the United States means by "SLUSA's limits on state-court jurisdiction," besides the "except" clause itself. If the United States means Section 77p(b), it has once again conflated preclusion with jurisdiction.

[3] According to the United States, certain covered class actions alleging only 1933 Act claims may be removed to federal court because they fall within the exception to the removal bar in the penultimate sentence of Section 77v(a). U.S. Br. 13. That exception reads: "[e]xcept as provided in section 77p(c) of this title." 15 U.S.C. § 77v(a). If the United States is willing to construe that exception to apply to certain covered class actions alleging only 1933 Act claims, there is no reason it should not be willing to construe the similarly worded "except" clause of the first sentence of Section 77v(a) to apply to the same covered class actions, including respondents' suit in this case.

clause divests state courts of jurisdiction over "covered class actions" alleging only 1933 Act claims. The California Superior Court in this case thus lacked jurisdiction over respondents' 1933 Act suit. This Court should grant review and reverse the judgment of the California Court of Appeal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

CYAN, INC., ET AL., PETITIONERS

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, ET AL.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,
FIRST APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether state courts lack subject-matter jurisdiction over "covered class actions," 15 U.S.C. 77v(a), that allege only claims under the Securities Act of 1933.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States, through the Securities and Exchange Commission and the Department of Justice, administers and enforces the federal securities laws. This case presents the question whether Congress, in enacting the Securities Litigation Uniform Standards Act of 1998 (SLUSA), Pub. L. No. 105-353, 112 Stat. 3227, withdrew state-court jurisdiction over certain private suits that allege violations of the federal securities laws. The United States has a strong interest in ensuring that the principles applied in private securities actions promote the purposes of the securities laws without unduly burdening the efficient operation of the securities markets. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. In 1995, prompted by concern that the salutary purposes of private securities litigation were being "undermined by * * * abusive and meritless suits," H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 31 (1995), Congress enacted the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737. The PSLRA established various reforms, including heightened pleading standards and an automatic stay of discovery, that apply to certain private securities-fraud actions. See, *e.g.*, 15 U.S.C. 77z-1.

After the PSLRA was enacted, however, Congress observed that "a number of securities class action lawsuits have shifted from Federal to State courts," which "has prevented that Act from fully achieving its objectives." SLUSA § 2(2) and (3), 112 Stat. 3227. Congress therefore enacted SLUSA to "prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the [PSLRA]." *Id.* § 2(5), 112 Stat. 3227. Congress sought to accomplish that goal by creating "national standards for securities class action lawsuits involving nationally traded securities, while preserving the appropriate enforcement powers of State securities regulators." *Ibid.*; see *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 82 (2006).

SLUSA amended the Securities Act of 1933 (1933 Act), 15 U.S.C. 77a *et seq.*, and other provisions of the securities laws in three respects that are relevant here. First, Congress barred private plaintiffs from pleading certain types of securities-fraud class actions under state law. Section 77p(b) of Title 15 provides that "[n]o covered class action based upon the statutory or common law of any State or subdivision thereof may be

maintained in any State or Federal court by any private party alleging" either "(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security" or "(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." 15 U.S.C. 77p(b); see 15 U.S.C. 77p(d) (providing that Section 77p(b) is inapplicable in certain circumstances). Section 77p(f)(2) defines the term "covered class action" to include certain suits in which damages are sought on behalf of more than 50 people. 15 U.S.C. 77p(f)(2). The term "covered security" is defined to include a security listed on a regulated U.S. national exchange. See 15 U.S.C. 77p(f)(3) (cross-referencing 15 U.S.C. 77r(b)). Taken together, those provisions prevent any court, state or federal, from hearing state-law securities class actions alleging false statements, omissions, or deceptive conduct in connection with a covered security.

Second, Congress recognized that plaintiffs might attempt to bring such actions in state court, and it was apparently concerned that state courts would not adequately enforce Section 77p(b)'s limitation. SLUSA therefore amended the 1933 Act to permit removal of such actions to federal court. Under Section 77p(c), "[a]ny covered class action brought in any State court involving a covered security, as set forth in subsection (b) of this section, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b)." 15 U.S.C. 77p(c). SLUSA also addressed the removal of such suits by amending language in the 1933 Act's general jurisdictional provision, 15 U.S.C. 77v(a). That provision had formerly barred removal of all cases arising under the

1933 Act, but SLUSA carved out an exception for removal of covered class actions by adding the language italicized below. See 15 U.S.C. 77v(a) ("*Except as provided in section 77p(c) of this title*, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.") (emphasis added).

Third, Congress amended the language in Section 77v(a) that provides for concurrent federal- and state-court jurisdiction over suits to enforce the 1933 Act. As amended by SLUSA, Section 77v(a) provides that "[t]he district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this subchapter * * * and, concurrent with State and Territorial courts, *except as provided in section 77p of this title with respect to covered class actions*, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter." 15 U.S.C. 77v(a) (emphasis added); see SLUSA § 101(a)(3), 112 Stat. 3230 (SLUSA amendment adding italicized language). This brief refers to the italicized language as the "except" clause.

2. In 2014, respondents brought a class-action suit against petitioners in California superior court.[1] The complaint alleges violations of provisions of the 1933 Act that govern disclosures made in registration statements and prospectuses. See J.A. 13 (citing 15 U.S.C. 77k, 77*l*(a)(2), and 77*o*); see generally *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 570-571 (1995). The complaint does not allege any state-law claims. See J.A. 13.

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[1] The parties appear to agree that the suit is a "covered class action," and that the securities in question are "covered securities," within the meaning of SLUSA. See Pet. Br. 14.

a. Petitioners moved for judgment on the pleadings for lack of subject-matter jurisdiction. On October 23, 2015, the superior court denied the motion. See Pet. App. 1a-6a. The court explained that its "hands [were] tied by" the decision in *Luther* v. *Countrywide Financial Corp.*, 125 Cal. Rptr. 3d 716 (Cal. Ct. App.), cert. denied, 565 U.S. 1080 (2011). Pet. App. 5a; see *id.* at 6a.

In *Luther*, the California Court of Appeal (Second District) held that state courts' concurrent jurisdiction over covered class actions alleging only claims under the 1933 Act had "survived the amendments" that SLUSA had made to the federal securities laws. 125 Cal. Rptr. 3d at 721. The defendant in *Luther* argued that 15 U.S.C. 77v(a), which establishes concurrent jurisdiction in state and federal courts "except as provided in section 77p of this title with respect to covered class actions," *ibid.*, should be read to refer to "the definition of covered class action in section 77p(f)(2)" and thus to "create[] an exception to concurrent jurisdiction for *all* covered class actions." 125 Cal. Rptr. 3d at 719. The court rejected that argument, explaining that "Section 77v does not say 'except as provided in section 77p(f)(2),' the definition of covered class action. Instead, it refers to all of section 77p, not just the definitional provision." *Id.* at 721; see *id.* at 721-722.

The California Court of Appeal in *Luther* stated that it would "look to all of section 77p[] and see what it provides 'with respect to covered class actions.'" 125 Cal. Rptr. 3d at 720. The court determined, however, that Section 77p does not "provide[]" anything that is relevant to a covered class action alleging only federal-law claims. *Ibid.*; see *ibid.* (stating that "[t]his case, which is not based on the statutory or common law of any state, is not precluded" under Section 77p(b)). The

court acknowledged that SLUSA "was enacted to stem the shift from federal to state courts and to 'prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of' the [PSLRA]." *Id.* at 722 (quoting *Dabit*, 547 U.S. at 82). It reasoned, however, that "an intent to prevent *certain* class actions does not tell us that this class action, or all securities class actions[,] must be brought in federal court." *Ibid.*

b. On December 2, 2015, petitioners filed a petition for a writ of mandate, prohibition, or other relief in the California Court of Appeal (First District). See Pet. 10. The court denied the petition without an opinion. See Pet. App. 15a.

On December 18, 2015, petitioners filed a petition for review in the Supreme Court of California. See Pet. 10. That petition, too, was denied without opinion. See Pet. App. 16a.

SUMMARY OF ARGUMENT

I. Under Section 77v(a), state courts have concurrent jurisdiction over suits that assert claims under the 1933 Act, "except as provided in section 77p of this title with respect to covered class actions." Because nothing in Section 77p divests state courts of jurisdiction over this covered class action, which asserts only 1933 Act claims, the courts below correctly allowed respondents' suit to proceed.

A. 1. Petitioners read the "except" clause as withdrawing jurisdiction from state courts over cases in which only 1933 Act claims are asserted. Although that reading would preserve the "except" clause as a limit on the concurrent jurisdiction of state courts, it cannot be squared with the statutory text. When Congress

states that a general principle applies "except as provided in" a particular provision, that language is naturally understood to mean that the cross-referenced provision is an exception to the general principle. Indeed, Congress has used the phrase ("except as provided") in precisely that manner elsewhere in the same chapter of Title 15. See, *e.g.*, 15 U.S.C. 77k(f); 15 U.S.C. 77p(a); 15 U.S.C. 77z-2(c). Nothing in Section 77p, however, even arguably "provide[s]" an exception to the general rule of concurrent state-court jurisdiction over a suit like this one, which asserts only federal-law claims.

2. Petitioners argue (Br. 18) that their interpretation is necessary to avoid a "gaping hole in the regulatory scheme" that would arise if Section 77v(a) were interpreted to permit state courts to exercise jurisdiction over class actions that assert claims only under the 1933 Act. Their argument, however, is based on the faulty assumption that no other provision added by SLUSA addresses class actions of that type. As explained below, Section 77p(c) is properly understood to permit removal of such suits to federal court, where they will be subject to the substantive and procedural safeguards that the PSLRA created.

3. Petitioners' interpretation of Section 77v(a)'s "except" clause would also create practical anomalies. The clause, as they read it, applies to a range of 1933 Act suits that is broader than the range of state-law suits covered by SLUSA's preclusion provision, Section 77p(b). Section 77p(b) applies only to cases that involve both a "covered security" and certain specified kinds of misconduct. Yet petitioners interpret the "except" clause as withdrawing state-court jurisdiction over certain 1933 Act suits that lack those attributes. There is

no evident reason that Congress would have wanted the "except" clause to sweep more broadly than Section 77p(b) in those respects. Petitioners offer various explanations for the mismatch that results from their theory, but none is persuasive.

B. There are at least two possible explanations for Congress's enactment of the "except" clause. Congress may have been concerned that Section 77v(a), by authorizing concurrent jurisdiction over "suits" and "actions" brought to enforce the 1933 Act, might be misconstrued as superseding the limitations imposed by Section 77p for "mixed" cases involving both state- and federal-law claims. Or Congress may have added the "except" clause in an abundance of caution, without having in mind any particular scenario in which Sections 77p and 77v(a) might conflict. In any event, the "except" clause is best read not to withdraw state-court jurisdiction over cases like this one, even absent a satisfying explanation for why Congress wrote it.

II. Petitioners contend that their reading of Section 77v(a)'s "except" clause, under which state courts may not adjudicate covered class actions asserting claims under the 1933 Act, is necessary to prevent circumvention of the PSLRA's substantive and procedural protections. Petitioners are correct that a federal forum must remain available in order for those protections to be efficacious. But the "except" clause is not the only statutory mechanism for ensuring such access in 1933 Act suits.

A. SLUSA amended Section 77v(a)'s anti-removal provision, which now prevents removal of 1933 Act suits "[e]xcept as provided in Section 77p(c) of this title." Section 77p(c), in turn, authorizes removal of "[a]ny covered class action brought in any State court

involving a covered security, as set forth in subsection (b)." Together, those provisions are best understood as permitting removal of any covered class action—whether the asserted claims arise under state or federal law—that contains allegations of the type specified in Section 77p(b)(1) and (2) (*i.e.*, false statements, omissions, or deceptive conduct in connection with the purchase or sale of a covered security). That interpretation is consistent with the text of Section 77p(c) ("[*a*]*ny* covered class action"), which does not turn on the source of substantive law under which the claims arise. Cf. 15 U.S.C. 77p(b) and (d).

This interpretation is also consistent with SLUSA's structure and purpose. Congress authorized removal of *state-law* class actions under Section 77p(c) because it was unwilling to leave preclusion decisions under Section 77p(b) to state courts alone. The Congress that took that step would not likely have denied defendants access to a federal forum for adjudication of analogous 1933 Act suits. And reading Sections 77p(c) and 77v(a) to permit removal of suits like this one would protect defendants against state-court circumvention of the PSLRA's requirements.

B. This Court's decision in *Kircher* v. *Putnam Funds Trust*, 547 U.S. 633 (2006), does not compel a different result. The district court in *Kircher* determined that the plaintiffs' state-law claims had not properly been removed under Section 77p(c) because the claims did not allege the type of misconduct described in Section 77p(b). This Court held that such a dismissal was properly understood as a dismissal for lack of subject-matter jurisdiction, because "authorization for the removal in subsection (c), on which the District Court's jurisdiction depends, [w]as confined to

cases 'set forth in subsection (b),' § 77p(c), namely, those with claims of untruth, manipulation, and so on." *Id.* at 642. That description is consistent with the government's interpretation of Section 77p(c). Elsewhere in its opinion, the Court stated more generally that "removal and jurisdiction to deal with removed cases is limited to those precluded by the terms of subsection (b)." *Id.* at 643. Read in context, however, that statement is best understood as shorthand for the more precise formulation the Court had given earlier. That contextual reading makes particular sense because *Kircher* involved only state-law claims, and so the variations in phrasing had no practical significance there.

ARGUMENT

The provision directly at issue in this case, 15 U.S.C. 77v(a), defines the jurisdiction of federal and state courts over 1933 Act claims. Section 77v(a) provides:

> The district courts of the United States * * * shall have jurisdiction of offenses and violations under this subchapter * * * and, concurrent with State and Territorial courts, *except as provided in section 77p of this title with respect to covered class actions*, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter.

Ibid. (emphasis added). The California trial court held that the italicized language—the "except" clause—did not divest it of jurisdiction over this covered class action, which asserts only claims arising under the 1933 Act.

That interpretation was correct. The "except" clause makes clear that, to the extent Section 77p establishes any limits on the authority of state courts to entertain 1933 Act claims, those limits will supersede the rule of

state-court concurrent jurisdiction that Section 77v(a) announces. But nothing in Section 77p actually "provide[s]" such a jurisdictional limitation. Contrary to petitioners' argument, reading Section 77v(a) to permit state courts to hear suits (like this one) that assert only 1933 Act claims will not undermine SLUSA's goal of preventing plaintiffs from circumventing the PSLRA's substantive and procedural requirements. That is because Section 77p(c), properly construed, authorizes removal of such suits to federal court, where they will be subject to the PSLRA's safeguards.

I. SECTIONS 77p(b) AND 77v(a) ALLOW STATE-COURT JURISDICTION OVER 1933 ACT SUITS

The "except" clause is most naturally read as a limitation on the preceding phrase dealing with the concurrent jurisdiction of state courts. In other words, federal courts "shall have jurisdiction * * * of all suits in equity and actions at law brought to enforce" obligations created by the 1933 Act, and the federal jurisdiction in question shall be "concurrent with" state courts, "except as provided in section 77p * * * with respect to covered class actions." 15 U.S.C. 77v(a). If Section 77v(a) is read in that manner, one would expect Section 77p to limit in some way state-court jurisdiction over covered class actions brought under the 1933 Act.

The operative provision of Section 77p, however, contains no such limitation. Section 77p(b) provides that certain covered class actions "based upon the statutory or common law of any *State* or subdivision thereof" may not be maintained "in any State *or* Federal court." 15 U.S.C. 77p(b) (emphases added). By its terms, that provision addresses only certain class actions brought under state law, and it has no meaningful application to the 1933 Act suits that are referenced in Section 77v(a).

Moreover, Section 77p(b) precludes both state and federal courts from hearing the specified state-law class actions. Section 77p(b) therefore does not limit the concurrent state-court jurisdiction over 1933 Act claims that Section 77v(a) generally provides. Nor does any other provision within Section 77p divest state courts of jurisdiction over any category of 1933 Act claims.

A. Petitioners' Reading Of Section 77v(a)'s "Except" Clause Is Unpersuasive

Petitioners argue (Br. 16) that the cross-reference in the "except" clause refers to the *definition* of "covered class action" set forth in Section 77p(f)(2). That provision defines a covered class action as a suit in which more than 50 people seek damages and common questions predominate; it does not look to whether the action is brought under federal or state law. Under petitioners' approach, the "except" clause divests state courts of jurisdiction over "all suits in equity and actions at law brought to enforce" the 1933 Act that fall within Section 77p(f)(2)'s definition of "covered class action." 15 U.S.C. 77v(a). Petitioners' approach has the virtue of preserving the "except" clause as a limit on the concurrent jurisdiction of state courts, but it does so by ignoring the statutory text.

1. Many federal statutory provisions use the phrase "except as provided in * * * ," followed by a statutory cross-reference. That language is most naturally read as making clear that the cross-referenced provision supersedes, and thus creates an exception to, the more general rule in any circumstance where the two conflict. In the absence of such language, courts would need to employ various canons of construction (*e.g.*, the canon that the more specific statute controls over a more general one, or the canon that the later-enacted statute

takes precedence) to resolve the conflict between the two provisions. Language like "except as provided in * * * " obviates the need to apply those interpretive principles by making clear which of two provisions controls.

That is how Congress has used the phrase ("except as provided") in other sections of the same chapter of Title 15. See, *e.g.*, 15 U.S.C. 77k(f) (announcing a general rule of joint and several liability, "[e]xcept as provided in paragraph (2)," which provides a different liability rule for outside directors); 15 U.S.C. 77p(a) (announcing a general rule that "rights and remedies" under the statute do not displace others that may exist, "[e]xcept as provided in subsection (b)," which precludes certain state-law class actions); 15 U.S.C. 77z-2(c) (announcing a general safe harbor for certain forward-looking statements, "[e]xcept as provided in subsection (b)," which excludes protection for a narrower subset of statements). Indeed, the penultimate sentence of Section 77v(a) uses the phrase in precisely that manner. That sentence had long provided that 1933 Act claims filed in state court may not be removed to federal court, but SLUSA limited that prohibition by stating that the general rule applies "[e]xcept as provided in section 77p(c)." 15 U.S.C. 77v(a). The crossed-referenced provision, Section 77p(c), creates an exception to the general rule of non-removability by permitting removal of certain class actions that are brought under the 1933 Act and that allege specified types of misconduct. See pp. 24-27, *infra*.

Petitioners' reading of Section 77v(a)'s "except" clause does not fit within that pattern. Petitioners argue (Br. 16) that the clause "serve[s] to cross-reference th[e] definition" of "covered class action" that

appears in Section 77p(f)(2). But the "except" clause refers to "section 77p" in its entirety, not to the definitional provision in Section 77p(f)(2). If Congress had intended to cross-reference that definition in particular, it could easily have done so. Cf. 15 U.S.C. 77b(a)(16) (incorporating definition "as provided in section 78c(a)(55) of this title"); 15 U.S.C. 77ccc(2) (incorporating definition "as provided in paragraph (3) of section 2(a) of the Securities Act of 1933").

In any event, petitioners' argument would not be persuasive even if the "except" clause had specifically referenced Section 77p(f)(2). Neither that definition, nor any other language within Section 77p, can colorably be read as "provid[ing]" an exception to the general rule of concurrent jurisdiction over a suit like this one, which alleges only 1933 Act claims. By reading the "except" clause as imposing limits on state-court jurisdiction that are not "provided in" Section 77p itself, petitioners urge a reading of the clause that its language will not bear.

2. In an attempt to bolster their interpretation of Section 77v(a)'s "except" clause, petitioners contend (Br. 16) that their textual argument is "reinforce[d]" by SLUSA's "structure." Petitioners describe SLUSA as separately addressing three different types of covered class actions: (1) those asserting solely claims that arise under state law; (2) those asserting solely claims that arise under the 1933 Act; and (3) "mixed" class actions that contain both 1933 Act claims and state-law claims. Petitioners argue (Br. 17) that the first category (state-law class actions) is addressed by Section 77p(b) and (c). As noted above, Section 77p(b) precludes altogether certain state-law class actions that assert claims for false statements, omissions, or deceptive conduct in

connection with a covered security; and Section 77p(c) permits removal of such a suit from state to federal court. See pp. 2-3, *supra*. Petitioners contend (Br. 17-18) that the third category of covered class actions ("mixed" class actions) is addressed by the penultimate sentence of Section 77v(a), which forbids removal of 1933 Act cases filed in state court "[e]xcept as provided in section 77p(c)." In petitioners' view (Br. 18), Section 77p(c) authorizes removal of a suit "that involves *both* 1933 Act *and* state-law claims," but not of a suit that asserts 1933 Act claims alone.

Given SLUSA's treatment in these provisions of state-law and mixed claims, petitioners infer that Section 77v(a)'s "except" clause should be construed as applying to—and thus excepting from state jurisdiction—claims that arise solely under the 1933 Act:

> If the preclusion provision addresses *state-law* covered class actions, and if the amendment to the anti-removal provision addresses *mixed* covered class actions, then the "except" clause in the jurisdictional provision should naturally be understood to address the only category of covered class actions of federal concern remaining: *1933 Act* covered class actions.

Pet. Br. 18. Any other interpretation, petitioners maintain (*ibid.*), would "leave a gaping hole in the regulatory scheme."

Petitioners' structural argument reflects an accurate assessment of congressional purpose. Congress would not have been content to leave 1933 Act claims "stuck in state court," Pet. Br. 18, where they would not be subject to the PSLRA's substantive and procedural requirements. Petitioners are wrong, however, in reading Section 77v(a)'s anti-removal provision as permitting removal *only* of mixed claims. As explained below, that

provision is best read, along with Section 77p(c), as authorizing removal to federal court of covered class actions that are brought under the 1933 Act and that allege the types of misconduct described in Section 77p(b). See pp. 24-27, *infra*. Upon removal, such a suit would be subject to the "national standards" that SLUSA was designed to ensure. SLUSA § 2(5), 112 Stat. 3227. As a result, there is no gap (let alone a "gaping hole") in the regulatory scheme, and consequently no practical exigency to address through petitioners' strained reading of Section 77v(a)'s "except" clause.

SLUSA's exception to Section 77v(a)'s removal bar is illuminating in another respect as well. Just as the "except" clause contains the phrase "except as provided in section 77p," the penultimate sentence of Section 77v(a) contains the phrase "except as provided in section 77p(c)." Petitioners appear to recognize that, to determine the scope of the exception to section 77v(a)'s anti-removal provision, a court must construe the operative provisions of Section 77p(c) and identify those cases for which Section 77p(c) actually authorizes removal. Yet petitioners would apply a quite different approach to the "except" clause, one that abandons any effort to locate operative language in Section 77p that divests state courts of jurisdiction over suits like this one. There is no sound reason for that disparity.

3. Petitioners' reading of the "except" clause would also entail practical consequences that seem inconsistent with SLUSA's overall structure and purposes.

a. Section 77p(f)(2) defines the term "covered class action" broadly. Indeed, the statutory definition literally encompasses suits that have no connection to securities or securities markets. The operative provisions of Section 77p make clear, however, that Congress did not

view every "covered class action" so defined as a matter of distinct federal concern. Rather, those operative provisions apply not to covered class actions generally, but to particular types of covered class actions. See, *e.g.*, 15 U.S.C. 77p(b) (mandating dismissal of covered class actions that arise under state law and allege specified types of wrongdoing in connection with the purchase or sale of a covered security).

By treating the broad definition of "covered class action" as though it were an operative provision, petitioners' approach would cause the "except" clause to encompass a range of federal suits that in two respects is broader than the range of state-law actions that Section 77p(b) itself precludes. First, the state-law claims that are barred by Section 77p(b) all involve allegations of specified misconduct in connection with the purchase or sale of a "covered security." 15 U.S.C. 77p(b)(1) and (2); see 15 U.S.C. 77p(f)(3) (defining the term "covered security" through cross-reference to 15 U.S.C. 77r(b), which refers generally to securities that are listed on regulated national exchanges). Section 77p(f)(2)'s definition of "covered class action," however, does not limit that term to suits involving covered securities. Under petitioners' approach, the "except" clause therefore would divest state courts of jurisdiction over *all* "covered class actions" that are brought under the 1933 Act, including those that do *not* involve covered securities.

Second, Section 77p(b) bars federal and state courts from adjudicating only those state-law covered class actions that allege "an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security," or "that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered

security." 15 U.S.C. 77p(b)(1) and (2). SLUSA's definition of "covered class action," however, is not limited to suits that allege those forms of wrongdoing. That definition also encompasses, for example, class actions brought under provisions of the 1933 Act that permit a purchaser to sue a seller for offering or selling an unregistered security that is required to be registered. See 15 U.S.C. 77e, 77*l*(a)(1).

Petitioners' approach thus would bar state courts from adjudicating covered class actions under the 1933 Act even in circumstances where comparable state-law class actions could go forward. There is no evident reason that Congress would have wished SLUSA's divestiture of state-court jurisdiction to sweep more broadly with respect to 1933 Act suits than with respect to state-law claims. Those consequences highlight the incongruity of treating Section 77p(f)'s *definition* of "covered class action" as though it "provided" an "except[ion]" to Section 77v(a)'s general rule of concurrent federal- and state-court jurisdiction over 1933 Act claims.

b. Petitioners' efforts to explain the mismatch between the preclusion provision in Section 77p(b) and their reading of Section 77v(a)'s "except" clause are unpersuasive.

Petitioners contend (Br. 29) that the Securities Exchange Act of 1934 (1934 Act), 15 U.S.C. 78a *et seq.*, "reflects a similar approach," because it gives federal courts exclusive jurisdiction of all suits arising under the 1934 Act, see 15 U.S.C. 78aa(a), yet precludes only state-law class actions that involve covered securities, see 15 U.S.C. 78bb(f)(1). The analogy fails, however, because while SLUSA added a preclusion provision to the 1934 Act that mirrors the one it added to the 1933 Act, see § 101(b), 112 Stat. 3230, the 1934 Act has *always* required that

claims arising under that Act be brought in federal court. With respect to the 1933 Act, by contrast, SLUSA added both Section 77p(b)'s preclusion provision and Section 77v(a)'s "except" clause. Under those circumstances, Congress would not likely have written the new provisions in the mismatched manner that petitioners suggest.

Petitioners argue (Br. 29) that "the [PSLRA's] class-action-specific protections apply to all 1933 Act class actions—whether involving covered securities or not—so it makes sense that Congress would make the 'except' clause similarly as broad." Yet the "except" clause is *not* as broad, even under petitioners' reading of it. Whereas the PSLRA's protections apply to all plaintiff class actions arising under the 1933 Act, see 15 U.S.C. 77z-1(a)(1), the "except" clause is limited to "covered class actions." Under petitioners' reading of the "except" clause, SLUSA therefore precludes state-court jurisdiction over only a subset of the class actions that are covered by the PSLRA's protections.

Petitioners contend (Br. 30) that the relative narrowness of the preclusion provision in relation to the "except" clause (as they read it) reflects Congress's respect for "the deeper federalism concerns that preclusion raises." Petitioners are correct that Congress often treads more lightly when foreclosing entirely the availability of relief under state law (as the preclusion provision does) than when choosing the forum in which federal claims may proceed. But petitioners cannot explain why Congress would have chosen to make the "except" clause broader than the preclusion provision in the two *particular* respects identified above.

B. The "Except" Clause Can Reasonably Be Interpreted As Clarifying The Relationship Between Section 77v(a) And Section 77p

1. Under Section 77v(a), federal and state courts may exercise concurrent jurisdiction over 1933 Act claims "except as provided in section 77p * * * with respect to covered class actions." Petitioners identify nothing in Section 77p that even arguably "provide[s]" an exception to the general rule of concurrent jurisdiction over suits, like respondents', that assert 1933 Act claims alone. As a textual matter, the absence of any such statutory language provides a fully sufficient basis for the state trial court's exercise of jurisdiction here, despite the uncertainty as to what problem Congress was seeking to address when it enacted the "except" clause.

2. There are, however, at least two possible explanations for Congress's decision to enact the "except" clause. First, Congress may have been concerned about mixed class actions that contain both 1933 Act claims and state-law claims within the scope of Section 77p(b)—*i.e.*, claims under state law for false statements, omissions, or deceptive conduct in connection with a covered security. Because Section 77v(a) grants concurrent jurisdiction over "all *suits* in equity and *actions* at law" brought to enforce the 1933 Act, 15 U.S.C. 77v(a) (emphasis added), plaintiffs might have argued that Section 77v(a) provides state courts with jurisdiction over mixed class actions in their entirety. The "except" clause reinforces the understanding that state courts may not entertain any state-law claims that are barred by Section 77p(b), even when such claims are asserted along with the 1933 Act claims as to which concurrent jurisdiction exists.

Second, Congress may have added the "except" clause to Section 77v(a) in a more general excess of caution, as a way of ensuring that nothing in the 1933 Act's general jurisdictional provision would be taken to supersede SLUSA's limits on adjudication of state-law claims. Cf., *e.g.*, *Marx* v. *General Revenue Corp.*, 568 U.S. 371, 383-384 (2013) (explaining that language may be included in a statute to "remov[e] any doubt" on a particular point, and citing cases to that effect). That is particularly likely in the context of SLUSA, which was enacted to block "bypass" of the PSLRA. *Kircher* v. *Putnam Funds Trust*, 547 U.S. 633, 636 (2006). Congress could reasonably take that step even if it did not have in mind any particular circumstance in which Sections 77p and 77v(a) would produce conflicting results.

3. Petitioners assert that the two explanations just stated "rest[] on a faulty premise: that Section [77p(b)] itself is a 'jurisdictional' provision." Pet. Br. 40 (citation omitted). Instead, petitioners explain, Section 77p(b) "concerns 'preclusion,' not jurisdiction, so it has no bearing on the concurrent jurisdiction of state courts at all." *Ibid.* (citation omitted). Contrary to petitioners' argument, however, the explanations provided above do not depend on viewing Section 77p(b) as a jurisdictional provision. Rather, they depend on the indisputable fact that *Section 77v(a)* is a jurisdictional provision. Because Section 77v(a) authorizes state-court jurisdiction over at least some "suits in equity and actions at law" that include claims arising under the 1933 Act, Congress may have been concerned that such an authorization would be construed as overriding the limitations imposed by Section 77p(b), at least in cases where state-law claims were also present (*i.e.*, in mixed suits). The "except" clause, by making clear that Section 77p takes

precedence over Section 77v(a)'s grant of concurrent state-court jurisdiction if the two provisions ever conflict, forecloses that possibility.

Petitioners also observe (Br. 41) that Section 77p(b) prohibits federal as well as state courts from hearing certain state-law covered class actions. Petitioners argue (Br. 41-42) that, if Congress had wished to make doubly clear that Section 77v(a) did not supersede those prohibitions, it would not have framed the "except" clause as an exception to concurrent *state-court* jurisdiction alone. But while Section 77p(b) applies in both federal and state courts, other SLUSA provisions manifest Congress's particular concern about potential abuses in state-court securities litigation. That concern is reflected in congressional findings, see SLUSA §§ 2(2) and (3), 112 Stat. 3227 (finding that "a number of securities class action lawsuits have shifted from Federal to State courts," and that "this shift has prevented [the PSLRA] from fully achieving its objectives"), and in Section 77p(c)'s authorization to remove (*inter alia*) state-law covered class actions that the federal court must then dismiss.

4. A congressional directive that a particular rule applies "except as provided in" another law serves to make clear which statute will control in the event that two laws conflict. Congress may enact such language because it has identified particular circumstances where two laws will produce conflicting results. But it may also do so simply to ensure that a particular law is enforced according to its terms, and to eliminate any risk that another law will be construed to supersede it or to prevent its full implementation. Such caution may have been unnecessary in the present context, since

Section 77v(a) would not likely be construed to supersede Section 77p even if the "except" clause were deleted. But neither the uncertainty as to Congress's reasons for enacting the "except" clause, nor the possibility that Congress addressed a non-existent risk, provides a sound basis for giving the "except" clause a more expansive reading than its language will support.

II. SECTION 77p(c) AUTHORIZES REMOVAL TO FEDERAL COURT OF COVERED CLASS ACTIONS THAT ARE BROUGHT UNDER THE 1933 ACT AND ALLEGE THE TYPES OF MISCONDUCT THAT ARE DESCRIBED IN SECTION 77p(b)

Petitioners contend (*e.g.*, Br. 18-19, 25-26) that, unless Section 77v(a)'s "except" clause is read to divest state courts of jurisdiction over 1933 Act suits like this one, SLUSA cannot achieve its purpose of preventing circumvention of the PSLRA's substantive and procedural requirements. Petitioners are correct that the efficacy of those requirements depends on defendants' access to a federal forum. Petitioners are wrong, however, in assuming that the "except" clause provides the *only* statutory mechanism for ensuring such access in 1933 Act suits. SLUSA also established an exception to what had previously been a categorical bar on removal to federal court of 1933 Act suits filed in state court. If SLUSA is properly construed to authorize removal of state-court suits, Congress's policy judgments can be vindicated without adopting petitioners' atextual reading of the "except" clause.[2]

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[2] Because petitioners did not seek to remove this case to federal court, but instead asked the California trial court to dismiss on jurisdictional grounds, the question whether removal under Section 77p(c) would have been permissible is not squarely presented here.

A. SLUSA's Text, Structure, And Purpose Support Reading Section 77p(c) As Applying To Cases Arising Under The 1933 Act

Before SLUSA was enacted, Section 77v(a) categorically barred removal of any "case arising under [the 1933 Act] and brought in any State court of competent jurisdiction." 15 U.S.C. 77v(a) (1994). As amended by SLUSA, however, that removal bar now applies "[e]xcept as provided in Section 77p(c) of this title." 15 U.S.C. 77v(a). Section 77p(c), which was also added by SLUSA, provides in turn that "[a]ny covered class action brought in any State court involving a covered security, as set forth in subsection (b) of this section, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b)." 15 U.S.C. 77p(c).

The determination whether suits like respondents' are removable turns on the meaning of Section 77p(c)'s phrase "as set forth in subsection (b) of this section." That language is best understood to encompass both

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In construing Section 77v(a)'s "except" clause, however, this Court should consider the structure and purposes of the overall statutory scheme. The proper construction of Section 77p(c), and of Section 77v(a)'s anti-removal provision, are particularly relevant to the question presented in two ways. First, petitioners raise a structural argument (Br. 17-18) that is based on their reading of Section 77v(a)'s anti-removal provision as applying only to "mixed" class actions, *i.e.*, class actions that assert both 1933 Act and state-law claims. See pp. 14-16, *supra*. Respondents' argument (Br. 12-13, 23) rests on a similar interpretation of the anti-removal provision. Second, the force of petitioners' concern about the potential for state-court circumvention of PSLRA requirements depends substantially on whether SLUSA provides alternative protections against such circumvention. See pp. 26-27, *infra*. In resolving this case, the Court therefore could provide helpful guidance to lower courts about the scope of Section 77p(c)'s removal authorization.

federal- and state-law suits that allege the type of misconduct described in Section 77p(b)—*i.e.*, "(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security," or "(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." 15 U.S.C. 77p(b). Read that way, Section 77p(c) would permit removal of covered class actions like this one that arise solely under the 1933 Act, as well as covered class actions that arise solely under state law and "mixed" covered class actions that involve both types of claims.

To be sure, a covered class action is not *subject to dismissal* under Section 77p(b) unless it is "based upon the statutory or common law of [a] State or subdivision thereof." 15 U.S.C. 77p(b). But if Congress had intended to limit removal to state-law claims, it presumably would have made that limitation explicit in Section 77p(c) itself, as it did in the neighboring provisions. See 15 U.S.C. 77p(b) ("No covered class action based upon the statutory or common law of any State or subdivision thereof"); 15 U.S.C. 77p(d)(1)(A) ("a covered class action * * * that is based upon the statutory or common law of the State in which the issuer is incorporated * * * or organized"). That contrast suggests that Congress deliberately chose not to limit removability to claims filed under state law. See *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 35 (1992) (relying, in construing a provision of the Bankruptcy Code, on "the contrasting language used in subsections (a) and (b) * * * and in subsection (c)").

If Section 77p(c) is construed to authorize removal of respondents' suit, Section 77v(a) poses no barrier to

that result. Before SLUSA was enacted, the penultimate sentence of Section 77v(a) gave 1933 Act plaintiffs their choice of forum by categorically barring removal of 1933 Act suits that were brought in state court. SLUSA amended Section 77v(a), however, to state that the removal ban would apply "[e]xcept as provided in section 77p(c)." The penultimate sentence of Section 77v(a) continues to displace more general grants of removal authority, see, *e.g.*, 28 U.S.C. 1441(a) (authorizing removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction"), and thus to preclude removal of *individual* actions brought in state court under the 1933 Act. SLUSA makes clear, however, that Section 77v(a) does not bar removal of any covered class action that is removable under section 77p(c).

Reading Section 77p(c) to permit removal of covered class actions that assert 1933 Act claims, moreover, is more consistent with SLUSA's structure and purposes than a contrary reading. With respect to the *state*-law suits that are precluded altogether by Section 77p(b), Congress authorized removal under Section 77p(c) in order to ensure that the preclusion determination could be made by a federal court if the defendant so requested. The Congress that was unwilling to leave those preclusion determinations to state courts alone would not likely have denied defendants access to a federal forum for adjudication of the merits of analogous 1933 Act claims.

For many covered class actions asserting 1933 Act claims—including this suit—removal under Section 77p(c) would give defendants substantially the same protection against state-court circumvention of the PSLRA's requirements that petitioners' interpretation

of the "except" clause in Section 77v(a) would provide. The most significant practical difference between the two approaches is that petitioners construe the "except" clause to bar state-court adjudication of *all* covered class actions brought to enforce the 1933 Act. Section 77p(c), by contrast, does not authorize removal of covered class actions that do not involve covered securities, or that allege a type of misconduct other than the types described in Section 77p(b)(1) and (2). Cf. pp. 16-18, *supra*. Allowing plaintiffs to litigate such 1933 Act claims in state court, however, is consistent with the congressional policy judgments reflected in SLUSA, because SLUSA does not disturb state courts' authority to adjudicate *state*-law claims having those characteristics.

B. The Government's Interpretation Of Section 77p(c) Is Consistent With This Court's Decision In *Kircher*

In *Kircher*, *supra*, the Court addressed whether "an order remanding a case removed under" SLUSA is appealable under 28 U.S.C. 1447(d), which "bars review of district court orders remanding for lack of subject-matter jurisdiction." 547 U.S. at 636, 638. In the course of its decision, the Court described the relationship between Section 77p(b) and Section 77p(c) in a manner that could be read to suggest that *only* state-law claims that are precluded under Section 77p(b) may be removed under Section 77p(c). Taken as a whole, however, the Court's discussion is fully consistent with a reading of Section 77p(c) that permits removal of covered class actions that assert solely 1933 Act claims, so long as those suits allege the type of misconduct described in Section 77p(b).

1. The plaintiffs in *Kircher* were mutual fund investors who filed class actions in Illinois state courts alleging that misconduct by the defendants had devalued

their holdings. The suits "asserted only state-law claims, such as negligence and breach of fiduciary duty." 547 U.S. at 637. The defendants attempted to remove the suits to federal court on the basis of Section 77p(c), but the plaintiffs "argued that the cases should be remanded for lack of subject-matter jurisdiction." *Ibid.*

The district court agreed that removal was improper. The court determined that the plaintiffs' suit would be removable under Section 77p(c) only if it involved the type of claim "set forth in subsection (b)," which in turn refers to misconduct "in connection with the purchase or sale of a covered security." 15 U.S.C. 77p(b) and (c); see 547 U.S. at 638. "Since the investors were said to have been injured as 'holders' of mutual fund shares, not purchasers or sellers, the District Court reasoned, their claims did not satisfy the 'in connection with the purchase or sale' requirement of the Act's preclusion provision, and the claims could therefore proceed in state court." 547 U.S. at 638 (citation and footnote omitted).[3]

The question for this Court was whether the district court's remand order—which was based on that court's view that the suits did not satisfy the "in connection with the purchase or sale" requirement of Section 77p(b)—was properly characterized as a remand for lack of subject-matter jurisdiction (and hence not appealable under 28 U.S.C. 1447(d)). 547 U.S. at 641-642. The Court concluded that the order was properly so

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[3] This Court later rejected the *Kircher* district court's view of Section 77p(b) in *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 82-88 (2006), where it determined that so-called "holder" claims may satisfy the "in connection with the purchase or sale" requirement.

characterized. The Court explained that "authorization for the removal in subsection (c), on which the District Court's jurisdiction depends, [w]as confined to cases 'set forth in subsection (b),' namely, those with claims of untruth, manipulation, and so on." *Id.* at 642 (citation omitted). The Court concluded that, by determining that the suits failed to allege misconduct "in connection with the purchase or sale" of a covered security within the meaning of Section 77p(b), the district court had necessarily determined as well that the suits were not removable under Section 77p(c). *Ibid.*

The defendants in *Kircher* argued that the district court's removal decision had instead "rested simply on an application of substantive law under subsection (b), law that was not jurisdictional at all." 547 U.S. at 642. They contended that the grounds for removal under Section 77p(c) were "broader" than the grounds for preclusion under Section 77p(b), so that a ruling that the plaintiffs' claims failed to satisfy the "in connection with the purchase or sale" requirement of Section 77p(b) would not necessarily resolve the claims' removability under Section 77p(c). *Id.* at 643. This Court disagreed, however, stating that "removal and jurisdiction to deal with removed cases is limited to those precluded by the terms of subsection (b)." *Ibid.* Given that correspondence, the Court held, "a motion to remand claiming the action is not precluded must be seen as posing a jurisdictional issue." *Id.* at 644.

2. *Kircher*'s treatment of the relationship between Section 77p(b) and Section 77p(c) is consistent with our view that covered class actions asserting claims under the 1933 Act may be removed if they allege the type of misconduct described in Section 77p(b)(1) and (2). The

Court explained, for instance, that removal under Section 77p(c) "[w]as confined to cases 'set forth in subsection (b),' namely, those with claims of untruth, manipulation, and so on." 547 U.S. at 642 (citation omitted). The Court also stated that the "set forth in subsection (b)" language "has no apparent function unless it limits removal to covered class actions involving claims like untruth or deception." *Ibid.*

On the next page of its opinion, the Court described the relationship between Section 77p(b) and Section 77p(c) in a somewhat different manner, stating that "removal and jurisdiction to deal with removed cases is limited to those precluded by the terms of subsection (b)." 547 U.S. at 643; see *id.* at 643-644 ("[R]emoval jurisdiction under subsection (c)" should be "understood to be restricted to precluded actions defined by subsection (b)."). Those statements are best understood, however, as shorthand for the more precise explanation the Court had just given regarding what it means to be "set forth in subsection (b)." *Id.* at 642. The difference between those two articulations of the removal standard had no practical significance in *Kircher*, which involved only state-law claims. See *id.* at 637. And the particular feature of the case that the *Kircher* plaintiffs had invoked as a barrier to removal—*i.e.*, the contention that the alleged misconduct had not occurred "in connection with the purchase or sale" of a covered security—was the type of argument that could just as readily have been made against removal of a class action alleging 1933 Act claims.

In sum, as explained above, Section 77p(c) is best construed to authorize removal of both state- and federal-law covered class actions that allege the kinds of misconduct described in Section 77p(b)(1) and (2), even

though a federal-law suit of that character would not be precluded by Section 77p(b). That construction, which ensures that defendants in such 1933 Act suits will receive the PSLRA's protections, is more faithful to SLUSA's text, overall structure, and purposes than is an interpretation that limits removal to state-law claims. *Kircher* should not be read to foreclose its adoption.

CONCLUSION

The judgment of the California Court of Appeal should be affirmed.

Respectfully submitted.

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RECORD AND BRIEFS.

No. 15-1439

Supreme Court, U.S.
FILED
SEP - 5 2017
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IN THE

Supreme Court of the United States

CYAN, INC., *et al.*,

Petitioners,

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

BRIEF OF ALIBABA GROUP HOLDING LIMITED, GOPRO, INC., KITOV PHARMACEUTICALS HOLDINGS LTD., LENDINGCLUB CORPORATION, NOVUS THERAPEUTICS, INC., PACIFIC BIOSCIENCES OF CALIFORNIA, INC., SIERRA ONCOLOGY, INC., SNAP INC., AND XBIOTECH INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici are issuers of securities that trade on either the New York Stock Exchange or NASDAQ. *Amici* have all been sued in putative class actions under the Securities Act of 1933 ("Securities Act") in state court in California. This brief is submitted in support of Petitioners' assertion that the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") eliminated state court jurisdiction over covered class actions that allege only claims under the Securities Act and that such actions are subject to exclusive federal court jurisdiction.

Amici are Alibaba Group Holding Limited, GoPro, Inc., Kitov Pharmaceuticals Holdings Ltd., LendingClub Corporation, Novus Therapeutics, Inc. (formerly Tokai Pharmaceuticals, Inc.), Pacific Biosciences of California, Inc., Sierra Oncology, Inc. (formerly ProNAi Therapeutics, Inc.), Snap Inc., and X Biotech Inc.

SUMMARY OF ARGUMENT

Congress passed the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 ("PSLRA"), to impose stricter substantive and procedural

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1. Pursuant to Supreme Court Rule 37.3(a), *amici curiae* submit this brief in support of a case before the Court for oral argument. Petitioners' and Respondents' consent to the filing of amicus briefs have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, *amici curiae* certify that no party or counsel for a party authored any portion of this brief or made a monetary contribution intended to fund its preparation or submission. No person other than *amici curiae*, its members, or its counsel have made such a monetary contribution.

controls on securities fraud claims and curtail abusive practices in such litigation. In reaction, many plaintiffs flocked to state courts, where they hoped that differences in procedural and substantive law would provide them a friendlier forum. Congress responded by enacting the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 ("SLUSA"). SLUSA eliminated state court subject matter jurisdiction over class actions asserting claims under the Securities Act, ch. 38, 48 Stat. 74. SLUSA's text and history both make plain why Congress chose to do so: Congress wanted class actions bringing federal securities law claims to be litigated in federal court, under uniform national rules, to promote uniformity and consistency in securities class action litigation.

The interpretation of SLUSA espoused by Respondents flies in the face of that design. And because that interpretation has been erroneously followed by some courts over the past decade, this Court need not wonder what practical impact it would have. The evidence is already there: Respondents' interpretation has led to an explosion of state court Securities Act class actions. It has subjected issuers to multiple, simultaneous suits in state and federal court. It has produced inconsistent outcomes on the merits. And it has opened the door to the very ills—"the targeting of deep pocket defendants . . . without regard to their actual culpability," and "the abuse of the discovery process" that imposes massive costs and forces settlement—that Congress sought to eliminate when it enacted its reforms. H.R. Conf. Rep. No. 104-369, at 31-32 (1995).

Indeed, because of the mistaken interpretation advanced by Respondents, the volume of state court Securities Act class actions has increased dramatically despite SLUSA. In just the past six years, at least 50 issuers were sued in Securities Act class actions in California state courts alone. Such cases cannot be centralized by the Judicial Panel on Multidistrict Litigation and instead must be litigated separately. That imposes significant additional costs on the newly public companies typically named as defendants in these cases (who also typically must indemnify the underwriters of their offerings that are named as defendants). The multi-pronged litigation also creates the potential for conflicts with federal decisions involving substantially identical allegations.

The risk of inconsistent outcomes is not just theoretical. In two recent instances, issuer defendants were sued in both state and federal court in class actions alleging violations of the federal securities laws. Although the complaints challenged the same allegedly false or misleading statements, the federal courts dismissed the claims *with prejudice* while the state courts allowed the claims to proceed. These divergent results stem from differing judicial philosophies, and sometimes different pleading standards. State courts—and particularly California courts, where most state court Securities Act class actions have been brought—often permit the pleading of conclusory "ultimate facts" and decline to apply the plausibility standards announced by this Court in *Twombly* and *Iqbal*. Indeed, state courts have repeatedly refused to dismiss Securities Act complaints no matter how improbable the allegations may be. As a result, complaints that would be dismissed in federal court regularly survive dismissal in state court.

Just as important, state courts regularly refuse to recognize the automatic discovery stay imposed by the PSLRA. Indeed, many California courts have explicitly invited plaintiffs to take discovery while a demurrer (the California state court equivalent of a motion to dismiss) is pending. Moreover, in those rare instances where California state courts have held that plaintiffs failed to state a claim, they have frequently encouraged plaintiffs to take discovery so that they can beef up their otherwise deficient allegations before filing an amended complaint. Thus, unlike the federal system, California state courts have allowed plaintiffs to discover their way into an arguably colorable claim. These practices are contrary to the PSLRA's goal of eliminating fishing expedition discovery. And they impose the extraordinary expense of discovery on issuers facing baseless claims.

These results are precisely what Congress sought to avoid when it provided for the application of uniform, national rules for Securities Act claims. For these reasons, and those set forth in Petitioners' brief, the judgment of the California Court of Appeal should be reversed.

ARGUMENT

I. CONGRESS PASSED THE PSLRA AND SLUSA AS A CHECK AGAINST ABUSIVE SECURITIES STRIKE SUITS AND TO PROMOTE UNIFORM AND CONSISTENT ENFORCEMENT OF THE FEDERAL SECURITIES LAWS

Congress passed the PSLRA to curb perceived "abuse[s]" in private securities litigation that were injuring "the entire U.S. economy." H.R. Conf. Rep. No. 104-369,

at 31-32 (1995). The House Conference Report highlighted nuisance filings, "the targeting of deep pocket defendants . . . without regard to their actual culpability," and "abuse of the discovery process to impose costs so burdensome that it is often economical for the victimized party to settle." *Id.* at 31. The PSLRA enacted both substantive and procedural controls on the litigation of cases brought under the federal securities laws. These included a mandatory stay of discovery pending a motion to dismiss, 15 U.S.C. § 77z-1(b)(1), and a requirement that plaintiffs file certifications setting forth their transactions in the security at issue during the class period. *Id.* § 77z-1(a)(2).

SLUSA was passed three years after the PSLRA. As Petitioners explain, SLUSA accomplished three things. First, it prohibited plaintiffs from bringing class actions under state securities laws by precluding those actions altogether. *Id.* § 77p(b); *see also id.* § 77p(c). Second, it provided that "mixed" class actions alleging claims under both the Securities Act and state law would be litigated in federal court by allowing such actions, if brought in state court, to be removed to federal court, where the state claims would be dismissed and the federal claims adjudicated. *Id.* §§ 77p(c), 77v(a). And third, it ensured that class actions alleging claims only under the Securities Act would be litigated in federal court by eliminating state court jurisdiction over such actions. *Id.* § 77v(a). SLUSA made these changes to "enact national standards for securities class action lawsuits involving nationally traded securities." Pub. L. No. 105-353, § 2(5), 112 Stat 3227, 3227; *see also* H.R. Conf. Rep. No. 105-803, at 13 (1998) ("[T]his legislation establishes uniform national rules for securities class action litigation involving our national capital markets."). To this end, SLUSA "***make[s]***

Federal court the exclusive venue for most securities fraud class action litigation." H.R Conf. Rep. No. 105-803, at 15 (1998) (emphasis added). "***The purpose of this title is to prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than in Federal, court.***" *Id.* at 13 (emphasis added).

Congress's stated goal could hardly have been clearer. Unfortunately, that goal has been thoroughly frustrated as some courts have misinterpreted SLUSA to allow Securities Act class actions filed in state court to remain in state court. The result has been a significant increase in state court Securities Act class actions and an increasing divergence of both practices and outcomes between state and federal Securities Act class actions.

II. PLAINTIFFS HAVE FLOCKED TO STATE COURTS TO LITIGATE PUTATIVE SECURITIES ACT CLASS ACTIONS

At a time when most complex class action litigation is being litigated in federal courts, Plaintiffs are filing state court class actions asserting exclusively Securities Act claims with increasing frequency. Most of these suits are being filed in the state courts of California. Indeed, since the California Court of Appeal held in *Luther v. Countrywide Financial Corp.*, 195 Cal. App. 4th 789 (2011), that state courts have jurisdiction over Securities Act class actions despite SLUSA, at least 50 securities issuers have been named as defendants in Securities Act class action suits in California state courts. *See* Appendix

A.[2] By contrast, only six issuers were sued in Securities Act class actions in California state courts in the entire decade preceding *Luther*. *See* Br. of the Securities Industry and Financial Markets Association, et al. as *Amici Curiae* in Supp. of the Pet. for Writ of Cert. at 7.[3]

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2. Plaintiffs have also filed Securities Act class action suits against issuers in other state courts. *See, e.g.*, *Bucks Cty. Emps. Ret. Fund v. Ally Fin. Inc.*, No. 16-013616-CZ (Mich. Cir. Ct. filed Oct. 21, 2016); *Pub. Emps.' Ret. Sys. of Miss. v. Endo Int'l plc*, No. 2017-02081-MJ (Pa. Ct. Com. Pl. filed Feb. 28, 2017) (removed to E.D. Pa., No. 17-1466, and remanded on Aug. 28, 2017); *City of Birmingham Ret. & Relief Sys. v. ZTO Express (Cayman) Inc.*, No. 01-CV-2017-902004.00 (Ala. Cir. Ct. filed May 16, 2017) (removed to N.D. Ala., No. 2:17-CV-1091-RDP, and stayed pending *Cyan*). No doubt litigation of Securities Act claims in state courts outside of California would be even more prevalent had many federal district courts outside of California not determined that Securities Act claims are removable. *See, e.g.*, *Schwartz v. Concordia Int'l Corp.*, No. 16-CV-6576 (NGG) (CLP), 2017 WL 2559777, at *8 (E.D.N.Y. June 12, 2017); *Hung v. iDreamSky Tech. Ltd.*, No. 15-CV-2514 (JPO), 2016 WL 299034, at *4 (S.D.N.Y. Jan. 25, 2016); *Gaynor v. Miller*, 205 F. Supp. 3d 935, 945-46 (E.D. Tenn. 2016).

3. More than 50% of these California state court actions were filed in the Superior Court for the County of San Mateo, which has become a magnet jurisdiction, with non-resident plaintiffs filing lawsuits to take advantage of what they deem to be a favorable venue. *See, e.g.*, *Buelow v. Alibaba Grp. Holding Ltd.*, No. CIV535692 (Cal. Super. Ct. San Mateo Cty. filed Oct. 5, 2015) (lawsuit against ecommerce company with principal operations in China); *In re Etsy, Inc. S'holder Litig.*, No. CIV534768 (Cal. Super. Ct. San Mateo Cty. filed July 21, 2015) (lawsuit against Brooklyn-based ecommerce company with no San Mateo operations); *Guo v. ZTO Express (Cayman) Inc.*, No. 17-CIV-03676 (Cal. Super. Ct. San Mateo Cty. filed Aug. 11, 2017) (lawsuit against China-based logistics company); *Iuso v. Snap, Inc.*, No. 17-CIV-03710 (Cal. Super. Ct. San Mateo Cty. filed Aug. 14, 2017) (lawsuit against Los Angeles-based social networking company with no San Mateo operations).

This dramatic growth in state court Securities Act litigation has left many issuers subject to competing, multi-forum litigation arising from nearly identical challenges to the same statements in public offering materials. Since 2011, at least half of the 50 issuers sued in Securities Act class actions in California state court have also faced contemporaneous securities fraud lawsuits in federal district courts. *See* Appendix A. These federal suits include not only parallel lawsuits under the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* ("Exchange Act"), which cannot be maintained in state court, but also parallel Securities Act lawsuits that challenge the same alleged misrepresentations being challenged in state court under the same federal statute. For example:

- ***Alibaba*** was sued in an Exchange Act class action in the Southern District of New York and a Securities Act class action in California Superior Court (San Mateo County);[4]

- ***Sunrun*** was sued in a Securities Act class action in the Northern District of California and a Securities Act class action in California Superior Court (San Mateo County);[5]

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4. *Christine Asia Co., Ltd. v. Alibaba Grp. Holding Ltd.*, No. 1:15-md-02631-CM (S.D.N.Y. filed June 24, 2015), appeal docketed, No. 16-2519 (2d Cir. July 20, 2016); *Buelow v. Alibaba Grp. Holding Ltd.*, No. CIV535692 (Cal. Super. Ct. San Mateo Cty. filed Oct. 5, 2015).

5. *Greenberg v. Sunrun Inc.*, No. 3:16-cv-02480-CRB (N.D. Cal. filed May 6, 2016); *In re Sunrun Inc. S'holder Litig.*, No. CIV538215 (Cal. Super. Ct. San Mateo Cty. filed Apr. 13, 2016).

- ***Etsy*** was sued in a Securities Act and Exchange Act class action in the Eastern District of New York and a Securities Act class action in California Superior Court (San Mateo County);[6] and

- ***Snap*** was sued in two Securities Act and Exchange Act class actions in the Central District of California and three Securities Act class actions in California Superior Court (San Mateo and Los Angeles Counties).[7]

As discussed below, the proliferation of California state court Securities Act litigation can be explained only by the many differences in how state and federal courts handle such cases. These differences place issuer defendants in state court actions at a meaningful disadvantage and result in marked inconsistencies in outcomes in parallel state and federal court securities litigation.

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6. *Altayyar v. Etsy, Inc.*, No. 1:15-cv-02785-AMD-RER (E.D.N.Y. filed May 13, 2015), appeal docketed, No. 17-1180 (2d Cir. Apr. 21, 2017); *In re Etsy, Inc. S'holder Litig.*, No. CIV534768 (Cal. Super. Ct. San Mateo Cty. filed July 21, 2015).

7. *Erickson v. Snap Inc.*, No. 2:17-cv-03679-SVW-AGR (C.D. Cal. filed May 16, 2017); *Gupta v. Snap Inc.*, No. 2:17-cv-05054-SVW-AGR (C.D. Cal. filed July 10, 2017); *Inso v. Snap, Inc.*, No. 17-CIV-03710 (Cal. Super. Ct. San Mateo Cty. filed Aug. 14, 2017); *Hsieh v. Snap Inc.*, No. BC669394 (Cal. Super. Ct. Los Angeles Cty. filed July 25, 2017); *Simpson v. Snap Inc.*, No. BC662444 (Cal. Super. Ct. Los Angeles Cty. filed May 23, 2017) (voluntarily dismissed following removal to C.D. Cal.).

III. RESPONDENTS' INTERPRETATION OF SLUSA HAS PRODUCED RAMPANT ABUSES AND INEFFICIENCIES IN THE LITIGATION OF SECURITIES ACT CLAIMS

A. State Court Actions Are Not Subject To Centralization By The Judicial Panel On Multidistrict Litigation, Thus Adding To Issuers' Burdens

Federal actions with "one or more common questions of fact" can be centralized in a single federal district. 28 U.S.C. § 1407(a). This procedure is aimed to advance the "just and efficient conduct" of actions. *Id.* The Judicial Panel on Multidistrict Litigation ("JPML") regularly holds that having a single judge preside over related actions has the effect of "providing consistency, preventing conflicting rulings, and greatly reducing the duplicative expenditure of judicial and party resources." *In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, MDL No. 2265, 2011 WL 11761004, at *1 (J.P.M.L. Dec. 21, 2011). Indeed, the JPML routinely consolidates federal securities litigation, including in cases involving Securities Act and Exchange Act claims. *See, e.g., In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 899 F. Supp. 2d 1374, 1375 (J.P.M.L. 2012).

The JPML is powerless, however, to act with respect to state court actions. Under Respondents' interpretation of SLUSA, therefore, there is no way to consolidate multiple federal and state court securities actions into a single court, even when they involve the exact same claims and allegations. That frustrates SLUSA's goal of streamlining litigation and preventing inconsistent rulings.

It also imposes substantial additional burdens on issuer defendants. Specifically, forcing companies to defend parallel state and federal class actions imposes massive litigation costs on the newly public companies that are typically named as defendants in cases under Section 11 of the Securities Act.[8] These burdens are particularly severe because issuers are almost always contractually bound to pay the attorneys' fees of the initial public offering ("IPO") underwriters that are typically named as co-defendants in Securities Act claims. Moreover, these indemnified underwriters' fees are generally not covered by director and officer insurance policies and must be borne by the issuers themselves.

B. The Pleading Standards Applied By Many State Courts Do Not Provide A Meaningful Check Against Frivolous Securities Act Litigation

Federal courts function as gatekeepers against baseless litigation and repeatedly reference this role in considering pleading challenges. *See, e.g., Palin v. New York Times Co.*, No. 17-CV-4853 (JSR), 2017 WL 3712177, at *1 n.1 (S.D.N.Y. Aug. 29, 2017) ("By requiring district courts to make plausibility determinations based on the pleadings, the Supreme Court has, in effect, made district courts gatekeepers.") (citing *Iqbal* and *Twombly*); *Pearson v. Vill. of Greenup, Ill.*, No. 09-CV-0699-MJR, 2009 WL

8. These burdens are further compounded in the case of foreign private issuers, who may face litigation in their home countries, in addition to both federal and state court suits. This exposure to parallel state and federal litigation places the U.S. capital markets at a competitive disadvantage and is yet another negative consequence of the frustration of SLUSA's goal of achieving uniform standards for securities litigation.

4789259, at *2 (S.D. Ill. Dec. 9, 2009) ("The Court has a role as a gatekeeper to prevent a plaintiff with a largely groundless claim from being allowed to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.") (citing *Twombly*) (quotation marks omitted). Such a check is particularly appropriate in securities class action litigation, which this Court has recognized, "if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007).

The federal courts' gatekeeper role is closely related to federal pleading standards. As this Court has held on multiple occasions starting with *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), federal plaintiffs must state "a plausible claim for relief," and judges evaluating the pleadings must engage in "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. Unless the pleading "nudge[s plaintiff's] claims across the line from conceivable to plausible," the complaint is subject to dismissal under Federal Rule of Civil Procedure 8. *Twombly*, 550 U.S. at 570. More recently, this Court explicitly held that *Iqbal* applies to Securities Act claims in federal court, and that meeting the pleading standard "is no small task for an investor." *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1332 (2015).[9]

9. Although *Twombly* and *Iqbal* post-date the PSLRA and SLUSA, this Court's decision in *Omnicare* makes clear that the pleading standard set forth in those cases is consistent with SLUSA's

By contrast, state courts often view state pleading rules as laxer than federal rules and decline to exercise a gatekeeper function. In California, for example, plaintiffs typically argue that a complaint must contain only "[a] statement of the facts constituting the cause of action, in ordinary and concise language." Cal. Civ. Proc. Code § 425.10(a)(1). Many California state courts have suggested that the operative standard is "fair notice," which permits the pleading of "ultimate" facts, *i.e.*, "the facts constituting the cause of action"—rather than "evidentiary" facts, *i.e.*, details that support the general factual assertions being made. *Doheny Park Terrace Homeowners Ass'n, Inc. v. Truck Ins. Exch.*, 132 Cal. App. 4th 1076, 1098-99 (2005); *see also McKell v. Wash. Mut., Inc.*, 142 Cal. App. 4th 1457, 1469 (2006) ("The rules of pleading require . . . only general allegations of ultimate fact. The plaintiff need not plead evidentiary facts supporting the allegation of ultimate fact.") (citations omitted); *Doe v. City of L.A.*, 42 Cal. 4th 531, 550 (2007); 49A Cal. Jur. 3d Pleading § 141 (2017) ("[A] complaint is not insufficient . . . because essential facts appear only inferentially, as conclusions of law, by way of recital, or as informal and argumentative allegations.") (footnotes omitted).

Moreover, in addition to accepting mere notice pleading, California state courts often reject the federal plausibility requirement and instead hold that "facts alleged in the pleading are deemed to be true, ***however***

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goal of effectuating the intent of the PSLRA and making federal courts gatekeepers for securities suits. *Id.* Moreover, regardless of when the plausibility requirement was articulated, it is now the law in federal courts but, as discussed below, is not applied by many state courts, thus resulting in a lack of uniformity in the evaluation of challenges to Securities Act pleadings.

improbable they may be." *Del E. Webb Corp. v. Structural Materials Co.*, 123 Cal. App. 3d 593, 604 (1981) (emphasis added).[10] And several have explicitly declined to "examine the 'plausibility' of allegations on a demurrer pursuant to Code of Civil Procedure § 430.10 in the same way that federal courts may examine the 'plausibility' of allegations on a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) and *Iqbal*." *Lee v. Wells Fargo Bank N.A.*, No. 34-2013-00153873-CU-OR-GDS, 2014 WL 3732002, at *3 (Cal. Super. Ct. Sacramento Cty. July 25, 2014); *see also In re FireEye, Inc. Sec. Litig.*, No. 1-14-CV-266866, 2015 WL 13546104, at *12 & n.91 (Cal. Super. Ct. Santa Clara Cty. Aug. 11, 2015) (court "not inclined to apply the federal heightened pleading standards set forth in [*Twombly/Iqbal*]" and noting that "[t]here appear to be no published cases in California applying the *Twombly/Iqbal* pleading standards to a Section 11 or Section 12(a)(2) action filed in state court").[11]

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10. *See also, e.g.*, *Osborne v. Yasmeh*, No. B262043, 2016 WL 4039863, at *11 (Cal. Ct. App. July 28, 2016) ("[T]he facts alleged in the pleading are deemed to be true, however improbable they may be."); *Franceschi v. Franchise Tax Bd.*, 1 Cal. App. 5th 247, 256 (2016) (same); *Popescu v. Apple Inc.*, 1 Cal. App. 5th 39, 44 (2016) (same); *Nolte v. Cedars Sinai Med. Ctr.*, 236 Cal. App. 4th 1401, 1406 (2015) (same); *Bock v. Hansen*, 225 Cal. App. 4th 215, 220 (2014) (same); *Leyte-Vidal v. Semel*, 220 Cal. App. 4th 1001, 1007 (2013) (same); *Friends of Glendora v. City of Glendora*, 182 Cal. App. 4th 573, 576 (2010) (same); *Align Tech., Inc. v. Bao Tran*, 179 Cal. App. 4th 949, 958 (2009) (same).

11. Although *amici* provide the Court with examples of decisions in which state courts reject the plausibility standard or apply "loose" pleading standards, *amici* believe, and issuers regularly and rightfully argue, that state courts should apply greater scrutiny to Securities Act complaints, similar to the scrutiny applied

These pleading standards can be outcome determinative. While federal courts regularly dismiss baseless Securities Act class actions on the pleadings with prejudice, *amici* are unaware of any California court that has sustained an initital demurrer to a Securities Act class action without leave to amend. Indeed, multiple California trial courts in Securities Act class actions have highlighted what they consider to be "liberal" and "loose" pleading standards as a principal reason for overruling demurrers to Securities Act class action complaints:

- "The real primary analysis of the Court is, yes, the Court is interpreting Federal law, but the Court is bound by a much looser pleading standard under California law than . . . under the Federal Rules of Civil Procedure . . . . That's really the analysis of the Court. It's a much lesser burden. That's all." Rep.'s Tr. of Proceedings at 9:22-10:3, *Buelow v. Alibaba Grp. Holding Ltd.*, No. CIV535692 (Cal. Super. Ct. San Mateo Cty. Oct. 20 and 24, 2016) (overruling demurrer).

- "You have to do a liberal pleading, accept it all as true. . . . And you want me to be looking at [news] articles and then seeing, you know, what is the nature and substance of each and how they compare [to the allegedly omitted information]. And that's just not in a state court pleading procedure . . . ." Hr'g Tr. at 14:8-9, 11-14, *Hosey*

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by federal courts. *Amici*, who are at different stages in their various state court proceedings, do not intend, through this submission, to waive any such arguments or to make any concessions or admissions with respect to their individual circumstances or cases.

v. Costolo, No. 16-CIV-02228 (Cal. Super. Ct. San Mateo Cty. Mar. 17, 2017) (overruling demurrer).

- Overruling demurrer based on "ultimate factual allegation" deemed sufficient "for purposes of California pleading standards." Order on Dem. at 5-6, *Robinson v. Audience, Inc.*, No. 1-12-CV-232227 (Cal. Super. Ct. Santa Clara Cty. Sept. 3, 2013); *see also* Order re: Dem. at 8, *In re MobileIron, Inc. S'holder Litig.*, No. 1-15-CV-284001 (Cal. Super. Ct. Santa Clara Cty. Oct. 4, 2016) (same).[12]

These differences have led to inconsistent outcomes on dispositive motions, even in cases where plaintiffs in federal and state court are challenging precisely the same alleged misrepresentations in offering documents.

One example of this phenomenon involves Alibaba, the world's largest ecommerce company, which runs online marketplaces similar to Amazon Marketplace and

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12. As one commentator recognized, "a defendant to a weak claim may stand a chance of disposing of the lawsuit with a motion to dismiss under the *Twombly/Iqbal* standard . . . . Faced with the same circumstances in a California state court, however, a defendant . . . would have to accept the complaint's allegations at face value without applying a plausibility standard." Elizabeth M. Weldon & Sean J. O'Hara, *Litigating in California State Court but Not a Local?*, Mar. 25, 2013, https://www.swlaw.com/assets/pdf/publications/2013/03/25/Litigating%20in%20California%20State%20Court%20Part%201.pdf; *see also* Eric E. Younger, *Younger on California Motions* § 6:26 (2d ed. 2016) ("An argument (even if true) that [a] plaintiff will never be able to prove a claim is simply a waste of time in a demurrer.").

eBay. Alibaba conducted its IPO in September 2014. In January 2015, a document purported to memorialize a meeting between Alibaba and Chinese regulators that took place several months before Alibaba's IPO, during which the regulators allegedly spoke critically of Alibaba's response to the sale of counterfeit goods by third-party merchants on its ecommerce platforms. Alibaba's stock price dropped following the initial posting of this document but continued to trade at approximately 50% above its IPO price. Seven Exchange Act securities fraud lawsuits were filed in federal district courts around the country and were thereafter centralized by the Judicial Panel on Multidistrict Litigation before Chief Judge Colleen McMahon in the Southern District of New York. *Christine Asia Co., Ltd. v. Alibaba Grp. Holding Ltd.*, 192 F. Supp. 3d 456 (S.D.N.Y. 2016) (the "Alibaba Federal Litigation"). Seven months later, and coinciding with a global stock market decline, Alibaba's stock price dropped below its IPO price for the first time. Three Securities Act lawsuits were then filed in California Superior Court (San Mateo County) challenging allegedly false and misleading statements in Alibaba's IPO registration statement (the "Alibaba California Litigation"). Plaintiffs relied on the same document on which plaintiffs in the Alibaba Federal Litigation relied. These lawsuits could not be consolidated with the pending federal actions because they were filed in state court.[13]

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13. Alibaba had removed the state court action, but it was remanded, and the California Superior Court subsequently rejected Alibaba's argument that it lacked subject matter jurisdiction to hear the Securities Act claims. The parties engaged in approximately six months of discovery in California before Alibaba's demurrer was even considered.

The allegations asserted in the Alibaba Federal Litigation and the Alibaba California Litigation had, in the words of the state court judge, an "extraordinary degree of factual overlap." Tentative Order at 14, *Buelow v. Alibaba Grp. Holding Ltd.*, No. CIV535692 (Cal. Super. Ct. San Mateo Cty. Oct. 17, 2016, incorporated by reference in final order Dec. 22, 2016). Indeed, both actions asserted the same alleged misrepresentations and omissions. *See* Appendix B. The only distinctions of any significance between the two actions were (1) the federal securities statute under which plaintiffs claimed violations, and (2) the court in which they were filed.

The outcome of Alibaba's challenges to the pleadings was not similar, however. In the Alibaba Federal Litigation, Chief Judge McMahon of the Southern District of New York granted Alibaba's motion to dismiss with prejudice after finding that Alibaba's IPO registration statement was neither false nor misleading. *Christine Asia*, 192 F. Supp. 3d at 482. In reaching this decision, the court reviewed Alibaba's IPO disclosures and concluded that the registration statement was "unusually comprehensive," "accurate and sufficiently candid" and "fully disclose[d] all substantive investment risks." *Id.* at 459, 469, 477. The decision was not based on a lack of particularity or specificity in the pleadings and did not require application of Federal Rule of Civil Procedure 9(b) or heightened PSLRA pleading standards. Instead, the federal court concluded that even if the allegations were accepted as true, the challenged statements were either not "materially misleading and actionable" or were "too general to be considered false or misleading." *Id.* at 478. Finally, Chief Judge McMahon concluded that "Defendants were under no duty to disclose" Alibaba's

meeting with Chinese regulators. *Id.* at 482. Significantly, the court determined that plaintiffs' failure to plead actionable false statements was "'substantive' rather than the result of an 'inadequately or inartfully pleaded' complaint." *Id.* Thus, the court dismissed the Alibaba Federal Litigation with prejudice.

By contrast, the court in the Alibaba California Litigation declined to adopt the federal court's reasoning based on perceived differences in state and federal pleading standards and thus overruled Alibaba's demurrer. Plaintiffs had opposed Alibaba's demurrer by arguing that the "Federal rules of pleading differ from the rules of pleading in California state courts," specifically including *Iqbal* among pleading rules that were inapplicable in state court. Plaintiffs further contended that under "normal California pleading requirements," their complaint must be "liberally construed," and Alibaba's demurrer must be overruled "so long as [the complaint] apprises the defendant of the factual basis for the claim." Pls.' Suppl. Submission in Opp. to Defs.' Dem. re Order Entered in the Fed. Sec. Fraud Action at 2-3, *Buelow v. Alibaba Grp. Holding Ltd.*, No. CIV535692 (Cal. Super. Ct. San Mateo Cty. July 15, 2016). The San Mateo Superior Court accepted Plaintiffs' argument and overruled Alibaba's demurrer on the basis of the state court's more liberal pleading standard:

> The Court agrees with Defendants that given the extraordinary degree of factual overlap between this case and [the Alibaba Federal Litigation] it is important to address the reasoning for the Court's decision. However, it is also important to keep in mind that the Court

> in [the Alibaba Federal Litigation] viewed the adequacy of the allegations pursuant to a much stricter federal pleading standard.

Tentative Order at 14, *Buelow v. Alibaba Grp. Holding Ltd.*, No. CIV535692 (Cal. Super. Ct. San Mateo Cty. Oct. 17, 2016, incorporated by reference in final order Dec. 22, 2016). The Court decided that "[t]he pleading standards in federal and state court are different, and this distinction affects the Court's analysis of Defendants' demurrer" and that "[u]nder state pleading standards Plaintiffs' Complaint must be liberally construed." *Id.* at 6, 15 (quotation marks omitted). Notwithstanding the fact that Chief Judge McMahon's ruling was premised on the legal question of whether, even accepting plaintiff's allegations as true, Alibaba's risk disclosures were misleading, the Superior Court's "primary analysis" was based on the perceived difference in federal and "much looser" state pleading standards. Rep.'s Tr. of Proceedings at 9:22-10:1, *Buelow v. Alibaba Grp. Holding Ltd.*, No. CIV535692 (Cal. Super. Ct. San Mateo Cty. Oct. 20 and 24, 2016). Moreover, with respect to Alibaba's argument that its disclosures were sufficient to warn investors of the allegedly concealed risks, the Superior Court held that this question, which the federal court had resolved in connection with the motion to dismiss, "cannot be resolved by demurrer." Tentative Order at 16, *Buelow v. Alibaba Grp. Holding Ltd.*, No. CIV535692 (Cal. Super. Ct. San Mateo Cty. Oct. 17, 2016, incorporated by reference in final order Dec. 22, 2016).

If a consistent pleading standard had been applied, the Superior Court should have dismissed the Alibaba California Litigation with prejudice just as Chief Judge McMahon had dismissed the Alibaba Federal Litigation

with prejudice. Instead, the state court's perceived stark difference between the state and federal pleading standards led it to allow the case to continue with merits discovery even though the relevant factual allegations and legal standards for falsity were identical in the two actions.[14]

C. Inconsistent Outcomes In Securities Class Actions Litigated In Both State And Federal Courts Are Not Only A Result Of Perceived Differences In Pleading Standards

Federal and state courts considering virtually identical challenges to registration statements have reached conflicting decisions even in cases that have not turned on pleading standards. Such was the case for Sunrun, a San Francisco-based residential solar power company. It conducted its IPO on NASDAQ in August 2015. Before the company's IPO, a public utility had submitted a proposal

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14. Federal and California courts have also applied different summary judgment standards. In federal court, "a moving defendant may shift the burden of producing evidence to the nonmoving plaintiff merely by 'showing'– that is, pointing out through argument— the absence of evidence to support plaintiff's claim." *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 532 (9th Cir. 2000). By contrast, many California courts permit burden shifting only after the moving party presents ***evidence***—rather than just ***argument***—that the nonmoving plaintiff cannot meet its burden. *See Aguilar v. Atl. Richfield Co.*, 25 Cal. 4th 826, 854-55, as modified (July 11, 2001) (rejecting federal standard); *Fairbank*, 212 F.3d at 532 (contrasting federal and California standards). This high burden diminishes the availability of summary judgment as a tool to resolve Securities Act claims in California court on important issues, such as the existence of a false or misleading statement, and provides yet another reason why limiting Securities Act class actions to federal court is the only way to effectuate Congressional intent.

to the Nevada Public Utility Commission ("Nevada PUC") to limit net metering policies, on which Sunrun relied to sell solar panels in Nevada. In the Company's registration statement, Sunrun stated that it focuses on "favorable policy environments" with net metering programs. Sunrun warned investors that the "expiration, elimination or reduction of . . . rebates and incentives could adversely impact" its business and specifically disclosed that "changes to net metering policies may significantly reduce demand for electricity from our solar service offerings" and that utility companies and other special interests were "currently challenging solar-related policies to reduce the competitiveness of residential solar energy." In January 2016, Sunrun announced that it was withdrawing from the Nevada solar power market because the Nevada PUC had cut certain net metering policies. A Securities Act class action was filed in California Superior Court in April 2016. *See In re Sunrun Inc. S'holder Litig.*, No. CIV538215 (Cal. Super. Ct. San Mateo Cty. filed Apr. 13, 2016) (the "Sunrun California Litigation"). In May 2016, a parallel Securities Act lawsuit was filed in the Northern District of California. *Greenberg v. Sunrun Inc.*, No. 3:16-cv-02480-CRB (N.D. Cal. filed May 6, 2016) (the "Sunrun Federal Litigation").

The allegations in the Sunrun Federal Litigation and the Sunrun California Litigation are virtually identical. Both cases assert the same legal claims (violations of Sections 11, 12(a)(2) and 15 of the Securities Act), challenge the same registration statement and prospectus, and premise their claims on the same factual circumstances. *See* Appendix C (comparison of allegations). The only material difference between the two actions is the court in which they were filed. However, yet again, these two nearly identical cases produced diametrically opposite outcomes.

In the Sunrun Federal Litigation, Judge Charles Breyer of the Northern District of California granted Sunrun's motion to dismiss with prejudice. His decision carefully analyzed Sunrun's IPO disclosures, including Sunrun's regulatory risk factors, and concluded that plaintiffs had not sufficiently pleaded falsity. For example, Judge Breyer explained that the company's statement that it entered "favorable policy environments" was not false, "as the company's exit from Nevada made painfully clear." *Greenberg v. Sunrun Inc.*, 233 F. Supp. 3d 764, 772 (N.D. Cal. 2017). Additionally, Judge Breyer explained that plaintiff's allegation that Sunrun "sugarcoated" its Nevada regulatory risks was "a mirage" because Sunrun's disclosures adequately warned that regulatory developments could adversely affect its business. *Id.* at 773. The court dismissed the complaint with prejudice, concluding that "leave to amend would be futile. The Prospectus, after all, says what it says." *Id.* at 775.

By contrast, in the Sunrun California Litigation, the San Mateo Superior Court overruled Sunrun's demurrer and allowed the case to proceed to discovery without explicitly analyzing Sunrun's IPO disclosures. Case Mgmt. Order #2 at 3-4, *In re Sunrun Inc. S'holder Litig.*, No. CIV538215 (Cal. Super. Ct. San Mateo Cty. Jan. 17, 2017). Instead, the Superior Court simply concluded that plaintiffs had "adequately pleaded" the claim. *Id.* It also noted that it would not engage in the legal analysis performed by the federal court to consider whether the registration statement was false or misleading in light of its disclosures and publicly available information:

> Although Defendants strongly argue that the statements were not false and misleading, and

> asked the Court to make that determination by interpretation of the Nevada legislation discussed in the Complaint, such an inquiry is more appropriate on [a summary judgment] motion not demurrer here.

Id. at 3. Thus, the state and federal courts considering identical claims against Sunrun engaged in a starkly different level of analysis and reached diametrically opposed outcomes.

Sunrun is far from the only issuer that faces the potential for conflicting outcomes in Securities Act litigation. For example, earlier this year, three plaintiffs filed nearly identical Securities Act suits in San Mateo Superior Court related to the IPO of Avinger, Inc., a medical device company. *See Olberding v. Avinger, Inc.*, No. 17-CIV-02307 (Cal. Super. Ct. San Mateo Cty. filed May 25, 2017); *Gonzalez v. Avinger, Inc.*, No. 17-CIV-02284 (Cal. Super. Ct. San Mateo Cty. filed May 23, 2017); *Grotewiel v. Avinger, Inc.*, No. 17-CIV-02240 (Cal. Super. Ct. San Mateo Cty. filed May 22, 2017). In all three cases, the defendants removed to the U.S. District Court for the Northern District of California. Two of the plaintiffs moved to remand, which motions were granted based on the federal court's interpretation of the Securities Act's anti-removal bar. Order Granting Mots. to Remand, *Olberding v. Avinger, Inc.*, Nos. 4:17-cv-03398-CW, 4:17-cv-03401-CW (N.D. Cal. July 21, 2017). Because the third plaintiff did not seek remand, however, one case continues to move forward in federal court. *Grotewiel v. Avinger, Inc.*, No. 4:17-cv-03400-CW (N.D. Cal. filed June 12, 2017). Thus, Avinger faces a meaningful possibility of divergent future outcomes. As set forth in Appendix A,

other issuers face a similar risk based on parallel securities class action litigation proceeding simultaneously in state and federal courts.

D. Liberal State Court Discovery Practices Impose Significant And Asymmetrical Costs On Issuers From The Outset Of State Court Securities Class Action Litigation

Past the pleading stage, state courts continue to handle Securities Act cases differently than their federal counterparts, allowing discovery to proceed where federal courts do not. These discovery costs exponentially increase the cost of litigation. Victor Marrero, *The Cost of Rules, The Rule of Costs*, 37 Cardozo L.J. 1599, 1656-57 (2016) ("[D]iscovery is unmatched among the major sources of litigation costs; it generates more legal fees and expenses than any other round of court proceedings. According to various estimates, discovery can consume from fifty to as much as ninety percent of total legal costs in some cases."); *see* Lawyers for Civil Justice et al., *Litigation Cost Survey of Major Companies* 5 (2010).

In securities litigation, the financial burden of discovery is "asymmetric" because, "[w]hile plaintiffs incur minimal costs, defendants are required to produce numerous records and deponents, making the process extremely 'expensive and time-consuming.'" Laura A. McDonald, *Restoring the Balance After the Private Securities Litigation Reform Act of 1995*, 38 Fla. St. U. L.J. 911, 916 (2011) (footnotes omitted). Moreover, as stated above, the burdens on issuer defendants in Securities Act cases are particularly acute because they must normally pay the underwriter defendants' defense costs, including the cost of the underwriters' discovery efforts.

In an effort to shield issuers from the high cost of discovery in weak or frivolous securities class action litigation, the PSLRA provides that in private securities actions filed in federal court, "all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss." 15 U.S.C. § 77z-1(b)(1). By conditioning access to discovery on a plaintiff's ability to plead past a motion to dismiss, Congress affirmed its intent that the motion to dismiss phase be a meaningful hurdle. The mandatory discovery stay was motivated by concern that plaintiffs were "targeting [] deep-pocket defendants" and making "vexatious discovery requests" to develop inchoate or insufficient claims or to extract settlements from defendants who would find it less expensive to settle than to pay the high cost of discovery. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006); *see also Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008) ("[E]xtensive discovery ... allows plaintiffs with weak claims to extort settlements from innocent companies."); H.R. Conf. Rep. No. 104-369, at 31 (1995) ("[A]busive practices committed in private securities litigation include ... the abuse of the discovery process to impose costs so burdensome that it is often economical for the victimized party to settle.").

The PSLRA discovery stay reflected Congressional intent that plaintiffs should not be allowed to use discovery as a way to manufacture an arguably colorable securities claim after filing a deficient complaint. Congress recognized that plaintiffs had been filing abusive "lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer, and with only faint hope that the discovery process might

lead eventually to some plausible cause of action." H.R. Conf. Rep. No. 104-369, at 31 (1995). And in enacting the PSLRA, "Congress clearly intended that complaints in these securities actions should stand or fall based on the actual knowledge of the plaintiffs rather than information produced by the defendants after the action has been filed." *Petrie v. Elec. Game Card, Inc.*, 761 F.3d 959, 966 (9th Cir. 2014) (quotation marks omitted); *Newby v. Enron Corp.*, 338 F.3d 467, 471 (5th Cir. 2003) ("The stay protected defendants from plaintiffs who would use discovery to substantiate an initially frivolous complaint.") (citing H.R. Conf. Rep. No. 104-369, at 31, 32 (1995)).

Here again, the interpretation advanced by Respondents has turned this clear Congressional command on its head. Unfortunately for defendants in Securities Act class actions filed in California state court, California courts frequently do not enforce the PSLRA discovery stay. *See, e.g.*, Order Denying Defs.' Mot. to Stay Proceedings at 9-13, *In re Pac. Biosciences of Cal., Inc. Sec. Litig.*, No. CIV509210 (Cal. Super. Ct. San Mateo Cty. May 25, 2012) (calling defendants' argument that PSLRA applied to action "creative" but "not persuasive" because "it is only a discovery stay of federal securities class actions filed in federal court"); *Small v. Fritz Cos.*, 30 Cal. 4th 167, 178 (2003) (holding that "the PSLRA governs only actions in federal court" and "do[es] not affect state court [] actions"). Instead, California has long "liberally construed [its procedures] in favor of discovery." *Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 383 (1961), *superseded by statute on other grounds*, Stats. 1963, ch. 1744, § 1, p. 3477-79, as recognized by *Coito v. Superior Court*, 54 Cal. 4th 480 (2012). Indeed, California

provides for far broader discovery compared to the federal rules' new "proportionality" standard. *See* Beverly Reid O'Connell & Karen L. Stevenson, *Rutter Group Practice Guide: Federal Civil Procedure Before Trial, Cal. & 9th Cir. Eds.* ¶ 11:610 (2017). Although California courts have discretion to grant stays where justice permits, stays during the pendency of motions challenging pleadings tend to be the exception rather than the rule. It is thus common for discovery to commence in securities cases before demurrers are even briefed, let alone decided. *See In re Sunrun Inc. S'holder Litig.*, No. CIV538215 (Cal. Super. Ct. San Mateo Cty. filed Apr. 13, 2016) (commencing discovery before demurrers resolved); *In re Pac. Biosciences of Cal., Inc. Sec. Litig.*, No. CIV509210 (Cal. Super. Ct. San Mateo Cty. filed Oct. 21, 2011) (same); *In re Avalanche Biotechnologies, Inc. S'holder Litig.*, No. CIV536488 (Cal. Super. Ct. San Mateo Cty. filed Dec. 7, 2015) (same); *Plymouth Cty. Ret. Sys. v. Model N Inc.*, No. CIV530291 (Cal. Super. Ct. San Mateo Cty. filed Sept. 5, 2014) (same); *Wiley v. Envivio, Inc.*, No. CIV517185 (Cal. Super. Ct. San Mateo Cty. filed Oct. 5, 2012) (same); *In re CafePress Inc. S'holder Litig.*, No. CIV522744 (Cal. Super. Ct. San Mateo Cty. filed July 10, 2013) (same).

Moreover, California courts often hold that pleading deficiencies do not affect the right to take discovery. *See, e.g., Mattco Forge, Inc. v. Arthur Young & Co.*, 223 Cal. App. 3d 1429, 1436 n.3 (1990). Accordingly, California courts frequently permit (and even encourage) plaintiffs to take discovery even after a demurrer has been sustained with leave to replead. As one Superior Court succinctly put it:

> California law is clear. [Plaintiffs] have the opportunity to take discovery, to amend their complaint. And the fact that a demurrer has been sustained with leave to amend, if anything, bolsters their right to discovery, not negates it.

Rep.'s Tr. of Proceedings at 58:18-22, *Geller v. LendingClub Corp.*, No. CIV537300 (Cal. Super. Ct. San Mateo Cty. Sept. 30, 2016) (sustaining demurrer in part and ordering further discovery); *see also* Hr'g Tr. at 28:1-2, *In re Castlight Health Inc. S'holder Litig.*, No. CIV533203 (Cal. Super. Ct. San Mateo Cty. Jan. 27, 2016) ("There's no stay on discovery. Do whatever you need."); Hr'g Tr. at 49:18-19, *Hosey v. Costolo*, No. 16-CIV-02228 (Cal. Super. Ct. San Mateo Cty. Mar. 17, 2017) (setting deadline for amended pleading after sustaining demurrer as to Section 15 claim so that plaintiffs would have "enough time to propound" discovery as to that claim); Rep.'s Tr. of Proceedings at 4:16-19, *Giavara v. GoPro, Inc.*, No. CIV537077 (Cal. Super. Ct. San Mateo Cty. Nov. 22, 2016) (defense counsel noting that plaintiffs had "receiv[ed] tens of thousands of pages in extensive discovery" before making second attempt to plead claims).

These discovery practices provide yet another stark contrast to the system of checks and balances that Congress created through the PSLRA and SLUSA. Allowing Securities Act class actions to proceed to early merits discovery in state court further frustrates Congress's intent of encouraging uniform and consistent enforcement of the federal securities laws. This practice also undermines Congress's goal of discouraging frivolous securities litigation. To the contrary, by permitting, and even encouraging, fishing expedition discovery,

state courts allow plaintiffs to "discover their way" into arguably colorable claims despite lacking a valid initial cause of action.[15]

CONCLUSION

In short, the interpretation of SLUSA advanced by Respondents imposes on issuers the very burdens and disadvantages that Congress sought to eliminate when it enacted the PSLRA and SLUSA. These disadvantages lead, in turn, to the "extortionate settlements" that the PSLRA and SLUSA sought to stem. *Dabit*, 547 U.S. at 81. By properly construing SLUSA as eliminating state court jurisdiction for Securities Act class actions, this Court has the ability to eliminate this jurisdiction-based outcome disparity. *Amici* respectfully suggest that the Court avail itself of this opportunity to return all Securities Act class action litigation to the level federal playing field that Congress mandated. The judgment below should be reversed.

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15. The PSLRA's requirement that securities plaintiffs file certifications setting forth their transactions in the security at issue, 15 U.S.C. § 77z-1(a)(2), further protects federal court defendants but not state court defendants. In *In re Zynga Inc. Securities Litigation*, defendants in a lawsuit filed in federal court were able to determine based on the plaintiff's PSLRA certification, which set forth plaintiff's stock purchase dates, that the plaintiff lacked standing to pursue Securities Act claims. The federal court granted their motion to dismiss on this basis. No. C 12-04007 JSW, 2014 U.S. Dist. LEXIS 24673, at *9-11 (N.D. Cal. Feb. 25, 2014). By contrast, in *Reyes v. Zynga Inc.*, which was filed in state court, because the plaintiff was not required to file a PSLRA certification, defendants could not determine whether the plaintiff lacked standing until shortly before the case was dismissed, after more than two years of litigation. *See* Order Granting Pl. Robert Reyes' Unopposed Req. for Voluntary Dismissal of Action, *Reyes v. Zynga Inc.*, No. CGC-12-522876 (Cal. Super. Ct. San Francisco Cty. Feb. 11, 2015).

Respectfully submitted,

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APPENDIX

APPENDIX A — LITIGATION AGAINST ISSUERS IN CALIFORNIA STATE COURT

ISSUER NAME	CALIFORNIA COUNTY	MASTER CASE NUMBER	PARALLEL FEDERAL CASE(S)
A10 Networks	Santa Clara	1-15-CV-276207	
Aerohive Networks	San Mateo	CIV534070	
Alibaba	San Mateo	CIV535692	Exchange Act (S.D.N.Y.)
Apigee	San Mateo	CIV537817 17-CIV-02788	
Atmel	Santa Clara	1-15-CV-286958	
Audience	Santa Clara	1-12-CV-232227	
Avalanche Biotechnologies	San Mateo	CIV536488	Securities Act and Exchange Act (N.D. Cal.)
Avinger	San Mateo	17-CIV-02284	Securities Act (N.D. Cal.)[2]
CafePress	San Mateo	CIV522744	

1. Removed to the Northern District of California and no motion to remand was filed. Two other removed actions had been remanded following plaintiffs' motions.

Appendix A

ISSUER NAME	CALIFORNIA COUNTY	MASTER CASE NUMBER	PARALLEL FEDERAL CASE(S)
Castlight Health	San Mateo	CIV533203	
Clovis Oncology	San Mateo	CIV537068	Exchange Act (D. Colo.)
Code Rebel	Los Angeles	BC624918	Exchange Act (S.D.N.Y.)
Coupons.com	Santa Clara	1-15-CV-278399	
Cyan	San Francisco	CGC-14-538355	
CytRx	Los Angeles	BC541426	Securities Act and Exchange Act (C.D. Cal.)
Envivio	San Mateo	CIV517185	Securities Act (N.D. Cal.)
Etsy	San Mateo	CIV534768	Securities Act and Exchange Act (E.D.N.Y.)
Facebook[3]	San Mateo	CIV514065	
FireEye	Santa Clara	1-14-CV-266866	Exchange Act (N.D. Cal.)

2. Removed and centralized by JPML in Southern District of New York before remand motion was decided.

Appendix A

ISSUER NAME	CALIFORNIA COUNTY	MASTER CASE NUMBER	PARALLEL FEDERAL CASE(S)
Fitbit	San Francisco	CGC-16-552062	Securities Act and Exchange Act (N.D. Cal.)
GoPro	San Mateo	CIV537077	
Kitov Pharmaceuticals	San Mateo	17-CIV-00620	Exchange Act (S.D.N.Y.)
LendingClub Corporation	San Mateo	CIV537300	Securities Act and Exchange Act (N.D. Cal.)
MobileIron	Santa Clara	1-15-CV-284001	
Model N	San Mateo	CIV530291	
NantKwest	Los Angeles	BC621292	
Natera	San Mateo	CIV537409	
NRG Yield	Kern	BCV-16-100867	
Ooma	San Mateo	CIV536959	
Pacific Biosciences of California	San Mateo	CIV509210	Securities Act and Exchange Act (N.D. Cal.)
Pacific Coast Oil Trust	Los Angeles	BC550418	

Appendix A

ISSUER NAME	CALIFORNIA COUNTY	MASTER CASE NUMBER	PARALLEL FEDERAL CASE(S)
ProNAi Therapeutics	San Mateo	17-CIV-00595	Exchange Act (S.D.N.Y.)
Pure Storage	San Mateo	16-CIV-01183	
Revance Therapeutics	Santa Clara	1-15-CV-287794	
Sientra	San Mateo	CIV536013	Securities Act and Exchange Act (C.D. Cal.)
Smart Technologies	San Francisco	CGC-11-514673	Securities Act (S.D.N.Y.)
Snap	San Mateo[4] Los Angeles[5]	17-CIV-03710 BC669394	Securities Act and Exchange Act (C.D. Cal.)

3. Removed to the Northern District of California; pending motions to remand and to transfer venue to the Central District of California.

4. Removed to the Central District of California, related to the existing action in that district, then remanded *sua sponte*. A separate action in Los Angeles County Superior Court was removed to the Central District and voluntarily dismissed.

Appendix A

ISSUER NAME	CALIFORNIA COUNTY	MASTER CASE NUMBER	PARALLEL FEDERAL CASE(S)
STEC	Orange	30-2011-00489022	Securities Act and Exchange Act (C.D. Cal.)
SunEdison[6]	San Mateo	16-CIV-00884	Securities Act and Exchange Act (S.D.N.Y.)
Sunrun	San Mateo	CIV538215	Securities Act (N.D. Cal.)
TerraForm Global[7]	San Mateo	CIV535963	Securities Act (N.D. Cal.)
Tokai Pharmaceuticals	San Francisco	CGC-16-553796	Securities Act and Exchange Act (D. Mass.)
TrueCar[8]	Los Angeles	BC590999	

5. Removed under 28 U.S.C. § 1452 (related to bankruptcy proceedings).

6. Removed under 28 U.S.C. § 1452 (related to bankruptcy proceedings).

7. Removed and voluntarily dismissed with no remand motion filed.

Appendix A

ISSUER NAME	CALIFORNIA COUNTY	MASTER CASE NUMBER	PARALLEL FEDERAL CASE(S)
TrueChoice Solutions	San Diego	37-2017-23035-CU-FR-CTL	
Twitter	San Mateo	16-CIV-02228	
XBiotech	Los Angeles	BC602793	Exchange Act (W.D. Tex.)
Xoom	San Francisco	CGC-15-543531 CGC-15-544655	
ZELTIQ Aesthetics	Alameda	RG12621290	
ZTO Express	San Mateo	17-CIV-03676	Securities Act (N.D. Ala.[9] and S.D.N.Y.)
Zynga	San Francisco	CGC-12-522876	Exchange Act (N.D. Cal.)

8. Removed to the Northern District of Alabama from Alabama Circuit Court and stayed pending this Court's decision in *Cyan*.

APPENDIX B — ALIBABA STATE AND FEDERAL LITIGATION

Alibaba Comparison of Alleged Omissions and Misrepresentations

Challenged Statement/ Omission in California[1]	Challenged Statement/ Omission in S.D.N.Y.[2]
"[T]he Registration Statement failed to disclose that . . . on July 16, 2014, senior executives from Alibaba had met with senior Chinese government regulators and officials, who explained that Alibaba's e-commerce businesses were in serious violation of the laws and regulations of the People's Republic of China ('PRC')." (¶ 109)	"The Registration Statement . . . failed to disclose that . . . on July 16, 2014, senior executives from Alibaba had met with senior SAIC and AIC officials and were told that Alibaba's e-commerce businesses were in serious violation of PRC laws and regulations . . . ." (¶ 102)

1. Allegations taken from the Consolidated Complaint filed in *Buelow v. Alibaba Group Holding Limited*, No. CIV535692 (Cal. Super. Ct. San Mateo Cty.) on March 25, 2016.

2. Allegations taken from the Consolidated Complaint filed in *In re Alibaba Group Holding Limited Securities Litigation* (also referred to as *Christine Asia Co., Ltd. v. Alibaba Group Holding Limited*), No. 1:15-md-02631-CM (S.D.N.Y.) on July 1, 2015.

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Challenged Statement/ Omission in California	**Challenged Statement/ Omission in S.D.N.Y.**
"The Registration Statement also failed to disclose that Chinese regulators and officials had threatened Alibaba with thousands of financial penalties – each with a target of 1.0% of daily sales on its e-commerce platforms . . . ." (¶ 110)	"The Registration Statement . . . failed to disclose . . . that SAIC had threatened Alibaba with thousands of financial penalties – each with a target of 1.0% of daily sales on its ecommerce platforms." (¶ 102)
"The Registration Statement also failed to disclose . . . that the SAIC had already commenced the 'Red Shield Web Sword' special program to clean up rampant abuses on e-commerce platforms, including counterfeiting and consumer fraud, with Alibaba as one of its main targets." (¶ 110)	"The Registration Statement also failed to disclose that the SAIC had commenced the 'Red Shield and Web Sword' special program to clean up rampant abuses in Alibaba's ecommerce platforms, including counterfeiting and consumer fraud, and that the SAIC considered Alibaba one of its main targets." (¶ 103)

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Challenged Statement/ Omission in California	**Challenged Statement/ Omission in S.D.N.Y.**
"[T]he regulatory and legal system in China is complex and developing, and future regulations may impose additional requirements on our business." (¶ 111)	"[T]he regulatory and legal system in China is complex and developing, and future regulations may impose additional requirements on our business." (¶ 106)
"Maintaining the trusted status of our ecosystem is critical to our success, and any failure to do so could severely damage our reputation and brand, which would have a material adverse effect on our business, financial condition and results of operations." (¶ 111)	"Maintaining the trusted status of our ecosystem is critical to our success, and any failure to do so could severely damage our reputation and brand, which would have a material adverse effect on our business, financial condition and results of operations." (¶ 108)

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Challenged Statement/ Omission in California	**Challenged Statement/ Omission in S.D.N.Y.**
Alibaba's "ability to maintain our position as a trusted platform for online and mobile commerce is based in large part upon: . . . the quality and breadth of products and services offered by sellers through our marketplaces; [and] the strength of our consumer protection measures." (¶ 111)	"Alibaba's 'ability to maintain our position as a trusted platform for online and mobile commerce is based in large part upon: . . . the quality and breadth of products and services offered by sellers through our marketplaces; [and] the strength of our consumer protection measures.'" (¶ 110)
"We have received in the past, and we anticipate we will receive in the future, communications alleging that items offered or sold through our online marketplaces by third parties . . . infringe . . . intellectual property rights." (¶ 113)	"We have received in the past, and we anticipate we will receive in the future, communications alleging that items offered or sold through our online marketplaces by third parties . . . infringe . . . intellectual property rights." (¶ 112)

Appendix B

Challenged Statement/ Omission in California	**Challenged Statement/ Omission in S.D.N.Y.**
"Moreover, illegal, fraudulent or collusive activities by our employees could also subject us to liability or negative publicity. For instance, we learned that in early 2011 and 2012 in two separate incidents, certain of our employees had accepted payments from sellers in order to receive preferential treatment on Alibaba.com and Juhuasuan." (¶ 113)	"Moreover, illegal, fraudulent or collusive activities by our employees could also subject us to liability or negative publicity. For instance, we learned that in early 2011 and 2012 in two separate incidents, certain of our employees had accepted payments from sellers in order to receive preferential treatment on Alibaba.com and Juhuasuan." (¶ 118)
"If . . . information disseminated through our . . . websites were deemed by the PRC government to violate any content restrictions, we would not be able to continue to display such content and could become subject to penalties . . . , which could materially and adversely affect our business . . . ." (¶ 115)	"If . . . information disseminated through our . . . websites were deemed by the PRC government to violate any content restrictions, we would not be able to continue to display such content and could become subject to penalties . . . , which could materially and adversely affect our business . . . ." (¶ 125)

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Challenged Statement/ Omission in California	**Challenged Statement/ Omission in S.D.N.Y.**
"[I]f we do not take appropriate remedial action against sellers or service providers for actions they engage in that we know, or should have known, would infringe upon the rights and interests of consumers, we may be held jointly liable with the seller or service provider for such infringement." (¶ 115)	"[I]f we do not take appropriate remedial action against sellers or service providers for actions they engage in that we know, or should have known, would infringe upon the rights and interests of consumers, we may be held jointly liable with the seller or service provider for such infringement." (¶ 125)
"To protect consumers, brand owners and legitimate sellers and to maintain the integrity of our marketplaces, we have put in place a broad range of measures to prevent counterfeit and pirated goods from being offered and sold on our marketplaces." (¶ 117)	"To protect consumers, brand owners and legitimate sellers and to maintain the integrity of our marketplaces, we have put in place a broad range of measures to prevent counterfeit and pirated goods from being offered and sold on our marketplaces." (¶ 127)

Appendix B

Challenged Statement/ Omission in California	**Challenged Statement/ Omission in S.D.N.Y.**
"We have implemented measures to prevent, detect and reduce the occurrence of fictitious transactions on Taobao Marketplace and Tmall including . . . ." (¶ 117)	"We have implemented measures to prevent, detect and reduce the occurrence of fictitious transactions on Taobao Marketplace and Tmall including . . . ." (¶ 129)
"We maintain a 'no tolerance' policy with regard to counterfeit and fictitious activities on our marketplaces." (¶ 119)	"We maintain a 'no tolerance' policy with regard to counterfeit and fictitious activities on our marketplaces." (¶ 131)
"Violation of these laws, rules and regulations may result in penalties, including fines, confiscation of advertising income, orders to cease dissemination of the advertisements and orders to publish an advertisement correcting the misleading information." (¶ 121)	"Violation of these laws, rules and regulations may result in penalties, including fines, confiscation of advertising income, orders to cease dissemination of the advertisements and orders to publish an advertisement correcting the misleading information." (¶ 144)

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Challenged Statement/ Omission in California	**Challenged Statement/ Omission in S.D.N.Y.**
"These newly issued measures impose more stringent requirements and obligations on . . . the marketplace platform providers. For example, the marketplace platform providers are obligated to examine the legal status of each third-party merchant selling products or services on the platform and display on a prominent location on the web page of such merchant the information stated in the merchant's business license or a link to such business license . . . ." (¶ 121)	"These newly issued measures impose more stringent requirements and obligations on . . . the marketplace platform providers. For example, the marketplace platform providers are obligated to examine the legal status of each third-party merchant selling products or services on the platform and display on a prominent location on the web page of such merchant the information stated in the merchant's business license or a link to such business license . . . ." (¶ 147)

Appendix B

Alibaba Comparison of Core Factual Allegations

Core Factual Allegations in California[3]	Core Factual Allegations in S.D.N.Y.[4]
The July 16, 2014 Meeting	
"[J]ust two months prior, on July 16, 2014, senior executives from Alibaba had met with senior Chinese . . . officials, who explained that Alibaba's e-commerce businesses were in serious violation of [PRC] laws and regulations . . . ." (¶ 109; *see also* ¶ 28)	"[J]ust two months earlier on July 16, 2014, senior executives from Alibaba had met with senior SAIC and AIC officials and were told that Alibaba's e-commerce businesses were in serious violation of PRC laws and regulations . . . ." (¶ 102; *see also* ¶¶ 5, 7-10, 63-75, 91-92, 94-97, 107, 123, 140, 142, 146, 148, 150, 152, 159, 166-68, 173, 177)

3. Allegations taken from the Consolidated Complaint filed in *Buelow v. Alibaba Group Holding Limited*, No. CIV535692 (Cal. Super. Ct. San Mateo Cty.) on March 25, 2016.

4. Allegations taken from the Consolidated Complaint filed in *In re Alibaba Group Holding Limited Securities Litigation* (also referred to as *Christine Asia Co., Ltd. v. Alibaba Group Holding Limited*), No. 1:15-md-02631-CM (S.D.N.Y.) on July 1, 2015.

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Core Factual Allegations in California	**Core Factual Allegations in S.D.N.Y.**
At the July 16, 2014 meeting, the SAIC "notified Alibaba of a variety of illegal business practices" on its e-commerce platforms, including: • "sale of counterfeit goods," • "sale of . . . prohibited items," • "tak[ing] bribes from merchants," • "faking transactions," • "false and misleading advertising," and • "anticompetitive behavior." (¶¶ 28, 109; *see also* ¶¶ 112, 114, 116, 118, 120, 122)	"At the July 16, 2014 meeting, the SAIC admonished Alibaba for . . . a variety of illegal business practices" on its e-commerce platforms, including: • "sale of counterfeit goods," • "sale of . . . forbidden items," • "[t]aking bribes from merchants," • "faking transactions," • "false and misleading advertising," and • "anticompetitive behavior." (¶ 8; *see also* ¶¶ 70, 109, 111, 113, 115, 117, 119, 126, 128, 130, 132-33, 168, 177, 193)

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Core Factual Allegations in California	**Core Factual Allegations in S.D.N.Y.**
"Chinese regulators . . . had threatened Alibaba with thousands of financial penalties – each with a target of 1.0% of daily sales on its ecommerce platforms . . . ." (¶ 110; *see also* ¶ 114)	"SAIC had threatened Alibaba with thousands of financial penalties – each with a target of 1.0% of daily sales on its e-commerce platforms." (¶ 102; *see also* ¶¶ 11, 72, 104, 109, 113, 119, 123, 126, 140, 142, 146, 148, 150, 152, 159, 168, 172, 208)
"Alibaba's financial performance was reasonably likely to be materially impacted in order to comply with applicable regulations . . . ." (¶ 118(d); *see also* ¶ 112).	"Alibaba's financial performance was reasonably likely to be materially impacted as a consequence of yielding to SAIC pressure . . . ." (¶ 104; *see also* ¶¶ 4, 117, 128, 143)

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Core Factual Allegations in California	**Core Factual Allegations in S.D.N.Y.**
The "Red Shield Net Sword" Program	
"[T]he SAIC had already commenced the 'Red Shield Web Sword' special program to clean up rampant abuses on e-commerce platforms, including counterfeiting and consumer fraud, with Alibaba as one of its main targets." (¶ 110; *see also* ¶ 122(a))	"[T]he SAIC had commenced the 'Red Shield and Web Sword' special program to clean up rampant abuses in Alibaba's e-commerce platforms, including counterfeiting and consumer fraud, and that the SAIC considered Alibaba one of its main targets." (¶ 103; *see also* ¶¶ 58-62, 107, 122, 140, 143, 145, 159, 163-66, 177)
The "White Paper"	
"[O]n January 28, 2015, before the opening of trading, . . . SAIC . . . released a White Paper accusing Alibaba of engaging in the very illegal conduct disclosed to Alibaba executives in July 2014." (¶ 127; *see also* ¶ 36)	"On January 27, 2015 in the evening, after market close, . . . SAIC . . . released a white paper detailing Alibaba's illegal business practices . . . previously identified [at] the July 16, 2014 . . . meeting. (¶ 15; *see also* ¶¶ 191-93)

Appendix B

Core Factual Allegations in California	**Core Factual Allegations in S.D.N.Y.**
"[O]n January 29, 2015, Alibaba issued a press release announcing mixed financial results for 4Q14, and addressing the SAIC White Paper." (¶ 130; *see also* ¶ 40)	"[O]n January 29, 2015, . . . Alibaba issued a press release announcing . . . mixed financial results and address[ing] . . . the SAIC White Paper." (¶ 209; *see also* ¶¶ 17, 210, 220-24, 227)
Various media and analysts covered the "White Paper." (*See* ¶¶ 36-38, 41-42, 44-46, 48, 51, 127-28, 131-32, 134-37, 139, 142-44)	Various media and analysts covered the "White Paper." (*See* ¶¶ 15, 18, 134-135, 175, 195-98, 202-04, 208, 211-12, 214, 216-18, 234)
"[T]he price of Alibaba ADS's dropped" after the release of the "White Paper." (¶¶ 39, 43, 47, 50, 52-53, 129, 133, 138, 141, 145-46)	"[T]he price of Alibaba ADS dropped" after the release of the "White Paper." (¶¶ 16, 19-20, 201, 207, 213, 215)

Appendix B

Core Factual Allegations in California	**Core Factual Allegations in S.D.N.Y.**
Counterfeit Facilitation	
"Alibaba in fact did tolerate the sale of inauthentic goods on its web platforms and either permitted or turned a blind eye to fictitious transactions on its e-commerce platforms." (¶ 120)	"In truth Alibaba tolerated the sale of non-genuine merchandise on its websites and permitted, indeed in some cases created, fictitious transactions on its e-commerce platforms." (¶ 132; *see also* ¶¶ 133, 227-29)
"*Taobao* had optimized its search engines to specifically search and identify counterfeit vendors . . . ." (¶ 120)	"Taobao had optimized its search engines to specifically search and identify vendors of counterfeit products." (¶ 133; *see also* ¶¶ 227-29)
"Alibaba . . . facilitate[s] and encourage[s] the sale of an enormous number of Counterfeit Products through [its] self-described 'ecosystem,' . . . ." (¶ 140)	"Alibaba is intentionally facilitating the offer and sale of counterfeit products on its ecommerce platforms." (¶ 252; *see also* ¶¶ 120, 130-32, 134-36, 151-53, 185, 187, 227-29, 238-43, 252-74)

APPENDIX C — SUNRUN STATE AND FEDERAL LITIGATION

Sunrun Comparison of Alleged Omissions and Misrepresentations[1]

Challenged Statement/ Omission in California[2]	Challenged Statement/ Omission in N.D. Cal.[3]
"[T]he Registration Statement claimed to 'provide homeowners with simple, predictable pricing for solar energy that is insulated from rising retail electricity prices.'" (¶ 39)	Sunrun "provide[d] homeowners with simple, predictable pricing for solar energy that is insulated from rising retail electricity prices." (¶ 86)
Sunrun "focused its resources on markets with . . . favorable policy environments . . ." (¶ 42)	Sunrun "focus[ed its] resources on markets with . . . favorable policy environments . . ." (¶ 81)

1. All emphasis and alterations are removed unless otherwise noted.

2. Allegations taken from the Consolidated Complaint filed in *In re Sunrun Shareholder Litigation*, No. CIV538215 (Cal. Super. Ct. San Mateo Cty.) on Oct. 17, 2016.

3. Allegations taken from the Consolidated Amended Complaint filed in *Greenberg v. Sunrun Inc.*, No. 3:16-cv-02480-CRB (N.D. Cal.) on Oct. 21, 2016.

Appendix C

Challenged Statement/ Omission in California	**Challenged Statement/ Omission in N.D. Cal.**
"[I]n addition to changes in general rates charged to all residential customers, utilities are increasingly seeking solar-specific charges (which may be fixed charges, capacity-based charges, or other rate charges) . . . [A]ny of these changes could materially reduce the demand for our products and could limit the number of markets in which our products are competitive with electricity provided by the utilities." (¶ 47)	"We rely on net metering and related policies to offer competitive pricing to homeowners in all our current markets, and changes to net metering policies may significantly reduce demand for electricity from our solar service offerings." (¶ 82)

Appendix C

Challenged Statement/ Omission in California	**Challenged Statement/ Omission in N.D. Cal.**
"Utilities, their trade associates, and fossil fuel interests in the country are currently challenging net metering policies, and seeking either to eliminate it, cap it, or impose charges on homeowners that have adopted net metering. . . . Nevada . . . ha[s] metering caps . . . . If the net metering caps in . . . other jurisdictions are reached without an expansion of net metering policies, homeowners in the future will be unable to recognize the cost savings associated with net metering they currently enjoy." (¶ 47)	"Utilities, their trade associates, and fossil fuel interests in the country are currently challenging net metering policies, and seeking either to eliminate it, cap it, or impose charges on homeowners that have adopted net metering. . . . Nevada . . . ha[s] metering caps . . . . If the net metering caps in . . . other jurisdictions are reached without an expansion of net metering policies, homeowners in the future will be unable to recognize the cost savings associated with net metering they currently enjoy." (¶ 82)

Appendix C

Challenged Statement/ Omission in California	**Challenged Statement/ Omission in N.D. Cal.**
"Of the states in which we offer our solar service offerings, only Nevada is expected to reach its cap [on net metering] within the next 12 months unless the cap is increased. We currently expect Nevada to reach its cap in the next month unless it is increased. However, legislation has been adopted that requires that an uncapped program approved by the Nevada Public Utilities Commission be implemented in Nevada no later than December 31, 2015. If changes to net metering policies occur without grandfathering to existing homeowners, those existing homeowners could be negatively impacted which could create a default risk from those homeowners. Our ability	"Of the states in which we offer our solar service offerings, only Nevada is expected to reach its cap [on net metering] within the next 12 months unless the cap is increased. We currently expect Nevada to reach its cap in the next month unless it is increased. However, legislation has been adopted that requires that an uncapped program approved by the Nevada Public Utilities Commission be implemented in Nevada no later than December 31, 2015. If changes to net metering policies occur without grandfathering to existing homeowners, those existing homeowners could be negatively impacted which could create a default risk from those homeowners. Our ability

Appendix C

Challenged Statement/ Omission in California	**Challenged Statement/ Omission in N.D. Cal.**
to sell our solar services may be adversely impacted by the failure to expand existing limits to net metering." (¶ 47)	to sell our solar services may be adversely impacted by the failure to expand existing limits to net metering." (¶ 82)
Sunrun "currently provided solar energy services in Arizona, California, Delaware, Colorado, Connecticut, Hawaii, Maryland, Massachusetts, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania and South Carolina, as well as the District of Columbia." (¶ 45)	Sunrun "currently provide[d] solar energy services in Arizona, California, Delaware, Colorado, Connecticut, Hawaii, Maryland, Massachusetts, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania and South Carolina, as well as the District of Columbia." (¶ 84)

Appendix C

Challenged Statement/ Omission in California	**Challenged Statement/ Omission in N.D. Cal.**
Sunrun's "business was concentrated in certain markets, putting it at risk of region specific disruptions . . . [A]s of March 31, 2015, approximately 58% of Sunrun's customers were in California and [] the Company then expected much of its near-term future growth to occur in California." (¶ 45)	Sunrun's "business was concentrated in certain markets," but Sunrun "identified only California as a state in which it had concentrated business." (¶ 84)

Appendix C

Sunrun Comparison of Core Factual Allegations[4]

Core Factual Allegations in California[5]	Core Factual Allegations in N.D. Cal.[6]
"Sunrun's . . . business entails net metering . . ." (¶ 32)	"Net metering is vital to Sunrun's business model . . ." (¶ 43)
"[N]early half the states that permit net metering have reconsidered their net metering policies over the past year." (¶ 33)	"By the time of its August 2015 IPO, net metering subsidies were under heavy attack in Sunrun's most important markets." (¶ 49)
"On July 31, 2015, NV Energy [a Nevada public utility] . . . filed an application with the Nevada Public Utilities Commission ('PUC') seeking to curtail [net metering programs]." (¶ 36)	"[O]n July 31, 2015, NV Energy [a Nevada public utility] submitted a tariff proposal to reduce inequitable net metering subsidies." (¶ 57)

4. All emphasis and alterations are removed unless otherwise noted.

5. Allegations taken from the Consolidated Complaint filed in *In re Sunrun Shareholder Litigation*, No. CIV538215 (Cal. Super. Ct. San Mateo Cty.) on Oct. 17, 2016.

6. Allegations taken from the Consolidated Amended Complaint filed in *Greenberg v. Sunrun Inc.*, No. 3:16-cv-02480-CRB (N.D. Cal.) on Oct. 21, 2016.

Appendix C

Core Factual Allegations in California	**Core Factual Allegations in N.D. Cal.**
"If NV Energy got the changes it sought . . . it threatened to destroy Sunrun's . . . business in Nevada." (¶ 36).	"The proposal . . . was extremely unfavorable for Sunrun" and "the net metering subsidies . . . were unquestionably threatened." (¶¶ 57, 58)
"[O]n January 7, 2016, the Company admitted that it was ceasing all operations in Nevada." (¶ 53)	"On January 7, 2016, Sunrun issued a press release announcing that it would cease conducting business in Nevada because the Nevada PUC had cut net metering subsidies." (¶ 95)
"When Sunrun reported its fiscal 2015 results and fiscal 2016 guidance on March 10, 2016, the Company also admitted that residential solar growth would decline in 2016 due to its having halted operations in Nevada." (¶ 53)	"On March 10, 2016 . . . Sunrun issued a press release . . . reporting disappointing fiscal 2015 results. Specifically, the Company admitted that it had failed to meet revenue guidance because of its exit from Nevada." (¶ 97)

Appendix C

Core Factual Allegations in California	**Core Factual Allegations in N.D. Cal.**
"[I]nvestors learned for the first time the full extent of customer concentration the Company had in Nevada . . . at ~20% of Sunrun's direct deployments." (¶ 54)	"[T]he Company told investors for the first time exactly how concentrated the Company had become in Nevada. . . . where volume grew from almost zero to reach about 20%." (¶ 98)

RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

CYAN, INC., *et al.*,

Petitioners,

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, *et al.*,

Respondents.

On Writ of Certiorari to the Court of Appeal of California, First Appellate District

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INTEREST OF AMICI CURIAE[1]

Business Roundtable ("BRT") is an association of chief executive officers of leading U.S. companies that together have more than $6 trillion in annual revenues, employ nearly 15 million people, and pay more than $220 billion in dividends to shareholders each year. BRT was founded on the belief that businesses should play an active and effective role in the formation of public policy, and should participate in litigation as *amici curiae* where important business interests are at stake.

The Society for Corporate Governance (the "Society") is a professional association of over 3,200 governance professionals who serve approximately 1,600 public, private, and not-for-profit companies of most every size and industry. Its members support the work of corporate boards and executives in connection with corporate governance and disclosure obligations, compliance with corporate and securities laws and regulations, and stock-exchange listing requirements. The Society's mission is to shape corporate governance through education, collaboration, and advocacy, with the ultimate goal of creating long-term shareholder value through better governance.

Both BRT and the Society are intensely aware of the deleterious impact of meritless securities litigation on

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[1] This brief is submitted pursuant to Rule 37 of the Rules of the Supreme Court of the United States. Counsel for petitioners and respondents both have consented to this submission. No counsel for a party authored this brief in whole or in part, nor did any such counsel or anyone other than *amici* make any monetary contribution intended to fund the preparation or submission of this brief.

the management and governance of U.S. public companies and the practical ability of those companies to access the U.S. capital markets or to do so cost effectively. The members of BRT and the Society serve as officers, directors, and governance professionals of companies that regularly raise capital in securities offerings and are subject to the federal securities laws. Together, they offer a unique perspective on why state court jurisdiction over class actions asserting claims under the Securities Act of 1933 (the "1933 Act") undermines protections that Congress enacted to protect against vexatious securities claims and harms the U.S. economy.

SUMMARY OF ARGUMENT

The Private Securities Litigation Reform Act of 1995 (the "Reform Act") and Securities Litigation Uniform Standards Act of 1998 ("SLUSA") together address the intractable problems posed by vexatious class action securities litigation. They do so by channeling securities class actions into federal court, where comprehensive substantive and procedural safeguards apply.

Congress chose a federal forum for securities class actions to ensure fair and efficient adjudication of these claims, with uniform application of congressionally created protections for defendants and absent class members. This fairness, consistency, and uniformity is of critical importance to America's public (and not-yet-public) companies, which—together with their officers and directors—face the prospect of securities class actions whenever their stock prices decline. Honoring Congress's choice of an exclusive federal forum does not impede meritorious securities litigation. It simply ensures that these federal claims are brought in federal court, where they are subject to federal protections that promote efficient and

consistent adjudication, including early dismissal of obviously meritless cases.

The interpretation of SLUSA applied by the California courts in this case would undermine these congressionally mandated protections in a significant subset of federal securities cases: class actions asserting only claims under the 1933 Act, 15 U.S.C. §§ 1 *et seq.* Allowing state courts to exercise jurisdiction over this core category of federal cases would leave an incongruous hole in Congress's comprehensive statutory framework, which otherwise directs both federal and state class actions to federal court and its accompanying procedural safeguards. If accepted, such an interpretation would incentivize plaintiffs' counsel to select those state courts with the most permissive standards for pleading and maintaining class actions and to funnel 1933 Act claims there. This would revive the very evil that SLUSA was enacted to remedy: the proliferation in state court of meritless securities class actions that have value only for settlement purposes. Congress could not have intended this perverse result.

For the reasons set forth in petitioners' brief, the 1933 Act's jurisdictional provisions do not, as a matter of statutory text and construction, permit state court jurisdiction over class actions under the 1933 Act. BRT and the Society submit this *amicus* brief to highlight three additional, important reasons to hold that state courts lack subject matter jurisdiction over "covered class actions" alleging only 1933 Act claims.

First, the circumstances around SLUSA's passage, as well as its legislative history, leave no doubt that Congress intended to subject all securities class action litigation to the protections of the Reform Act in an exclusively federal forum. Moreover, because the original 1933 Act predated the development of the

modern class action by over three decades, the existence of its general provision for concurrent jurisdiction says nothing regarding the proper construction of Congress's enactment of the later, more specific jurisdictional provisions of SLUSA with respect to class actions. Indeed, no one in 1933 could have imagined the way the class action device would evolve or the abuses that Congress later explicitly sought to curb through the Reform Act and SLUSA.

Second, when state courts exercise jurisdiction over 1933 Act class actions, they deprive defendants and absent class members of many meaningful safeguards that Congress enacted to address abusive securities class action litigation. Inconsistent state court standards undermine the well-developed federal scheme that was specifically designed to curb meritless securities class actions, protect absent class members, and shield defendants from the burdens of lawyer-driven class action litigation. State courts inconsistently apply or dispense altogether with mechanisms such as the Reform Act's discovery stay and lead plaintiff selection provisions and the appeal process under Federal Rule of Civil Procedure 23(f). Nor is there any interstate analog to the Multidistrict Litigation Act of 1968, which permits the centralization of multiple proceedings in a single court. Plaintiffs' attorneys can and do take advantage of this lack of uniformity by searching out the most permissive fora in which to file 1933 Act class actions, duplicating proceedings and thus magnifying the cost to litigants, and exposing parties to the risk of contradictory legal rulings.

Third, uncertain and inconsistent application of the Reform Act's and SLUSA's protections directly harms securities issuers, as well as their officers and directors—who are almost always named as

defendants in 1933 Act class actions. It also harms the U.S. economy as a whole. Doubts that securities class actions will be handled pursuant to uniform federal standards discourage issuers from offering securities. By subjecting corporate issuers, officers, and directors to a patchwork of divergent laws and regulations, state securities class actions inappropriately increase litigation risk and costs. Those costs are ultimately borne by investors and shareholders.

BRT and the Society, together with their members, have first-hand experience with the negative effects and distraction that meritless securities class actions—particularly those filed in state court—can have on companies seeking to access the capital markets, as well as their senior executives and board members. This brief details the real costs of these harms to public companies, both directly and indirectly through loss of director and officer time and attention on meritless cases. Congress unequivocally held out the promise, through the Reform Act and SLUSA, that uniform federal procedures—consistently applied in an exclusively federal forum—would curtail, if not eliminate, these costs through pre-discovery dismissal of meritless claims and non-duplicative pretrial litigation in a single court. The statutory construction advanced by the California courts below and by respondents in this Court imperils this promise, contravening Congress's clear intent. This Court should accordingly reject that interpretation and hold, as petitioners demonstrate in their brief, that SLUSA revoked state court jurisdiction over class actions solely asserting 1933 Act claims.

ARGUMENT

I. Congress Intended for Federal Securities Class Actions to Be Heard in Federal Court

The Reform Act was enacted to curb abuses in the filing of meritless class action securities cases, and SLUSA was enacted to prevent plaintiffs' counsel from bringing securities class actions in state court to evade the Reform Act's more stringent requirements. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 82 (2006) (citing H.R. Rep. No. 105-640, at 10 (1998); S. Rep. No. 105-182, at 3–4 (1998)). At the time of SLUSA's enactment, securities class action litigation had begun to shift from federal to state courts, which were applying diverse substantive and procedural standards in adjudicating those cases. Congress responded by enacting SLUSA to provide an exclusive federal forum for securities class actions.

A. Securities Class Actions Imposed Significant Costs Prior to the Reform Act and SLUSA

Securities class action litigation is particularly susceptible to abuse. The expense and burden of discovery and the threat of astronomical damages can cause substantial harm to companies, officers, and directors, even in the most meritless of cases. *See, e.g.*, John H. Beisner, *Discovering A Better Way: The Need for Effective Civil Litigation Reform*, 60 Duke L.J. 547, 574 (2010).

A significant upsurge in meritless federal securities class actions by the 1990s highlighted the need for reform. *See, e.g.*, Barbara Moses & Rachel K. Jeck, *Securities Litigation Reform: Legislative Initiatives 1993-94*, C977 ALI-ABA 73, 75 (Jan 12, 1995) (noting that federal securities class actions more than doubled

in 1990 compared to rates throughout the 1980s); 141 Cong. Rec. S9,043 (daily ed. June 26, 1995) ("[M]eritless law class actions have skyrocketed.") (statement of Marc E. Lackritz, President, Securities Industry Association (Testimony before the Securities Subcommittee, Senate Banking Committee, March 2, 1995, at 3)).

The rise in securities class action litigation at this time negatively affected the capital markets by imposing a "litigation tax" on public securities issuers (as well as their officers and directors) that made expensive and disruptive litigation an increasingly significant variable in corporate decision making.[2] Richard M. Phillips & Gilbert C. Miller, *The Private Securities Litigation Reform Act of 1995: Rebalancing Litigation Risks and Rewards for Class Action Plaintiffs, Defendants, and Lawyers*, 51 Bus. Law. 1009, 1029 (1996) ("Meritless class actions thus impose a hidden 'litigation tax' . . . that ultimately injures public investors and weakens the U.S. economy."). The securities litigation climate was "adversely affecting capital marketplace decisions: whether companies go public, whether foreign companies seek listings on [U.S.] stock exchanges and NASDAQ, whether voluntary disclosure occurs (and in what form)." *Securities Litigation Reform: Hearings Before the Subcomm. on Telecommunication and Finance of the House Comm. on Energy and Commerce*, 103d Cong., 2d Sess. 34 (1994)

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[2] For example, Congress estimated that, in 1994, corporations or insurance companies paid $1.4 billion to settle securities lawsuits. S. Rep. No. 104-98, at 9 (1995) (citing *COP Targets Shareholder Suits*, Investors Business Daily, February 26, 1995, p. A1). Numerous empirical studies concluded that in the pre-Reform Act period, there was no relationship between settlement value and a claim's merits. *E.g.*, Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497 (1991).

(testimony of Donald C. Langevoort, Professor of Law, Vanderbilt University School of Law); *see also* Arthur Levitt, Chairman, U.S. Sec. & Exchange Comm'n, Private Litigation Under the Federal Securities Laws, Address at the Securities Regulation Institute (Jan. 26, 1994) (noting the prevailing view "that the current system imposes substantial costs on issuers"). As the Senate report on the Reform Act explained, "[o]ur economy does not benefit when strike suit artists wreak havoc on our Nation's boardrooms and deter capital formation." S. Rep. No. 104-98, at 10.[3]

The negative aspects of securities class actions in the pre-Reform Act period also harmed shareholders. Because being the first to file a complaint often proved determinative in the selection of a class representative and class counsel, plaintiffs' counsel were incentivized to rush into court without taking sufficient time to locate plaintiffs with the skills and resources to serve as effective class representatives or adequately investigating the claims. H.R. Conf. Rep. No. 104-369, at 32–33 (1995). Commentators at the time observed that "the single most salient characteristic of class and derivative litigation is the existence of 'entrepreneurial' plaintiffs' attorneys [who, b]ecause [they] are not subject to monitoring by their putative clients . . . operate largely according to their own self-interest."

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[3] Congress and commentators also concluded that the costs of meritless securities litigation chilled discussion and disclosure of issuers' future prospects and other "beneficial corporate practices," *see* John W. Avery, *Securities Litigation Reform: The Long and Winding Road to the Private Securities Litigation Reform Act of 1995*, 51 Bus. Law. 335, 339 (1996), and also discouraged qualified individuals from serving on boards of directors, S. Rep. No. 104-98, at 21. *See also* Part III, *infra*.

Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 7–8 (1991).

B. Congress Enacted the Reform Act to Curb Vexatious Securities Class Actions

In 1995, Congress acted to repair the securities class action system by passing the Reform Act. The Reform Act was Congress's solution to abuses of the "class-action vehicle in litigation involving nationally traded securities." *Dabit*, 547 U.S. at 81. The Reform Act codified a number of procedural and substantive safeguards aimed at reducing abusive filings and protecting class members and defendants from the harmful effects of the existing securities class action environment. *See* Part II, *infra*. The Reform Act did, however, unintentionally leave a significant loophole: plaintiffs could avoid the higher hurdles imposed by the Reform Act by filing securities class actions in state court.

Class action plaintiffs' attorneys immediately seized on this loophole, leading to a proliferation of securities class actions in state court. Prior to the Reform Act, plaintiffs' counsel had initiated "essentially no significant securities class action litigation" in state court. H.R. Rep. No. 105-640, at 10. But in the year following passage of the Reform Act, the Securities and Exchange Commission recognized numerous studies that found a significant increase—*by as much as 64%*—in state court securities class actions and labeled the shift to state court "in an apparent attempt to avoid some of the procedures imposed by the Reform Act" as perhaps "the most significant development in securities litigation post-[Reform Act]." *See* Office of the General Counsel, U.S. Sec. & Exchange Comm'n, Report to the

President and the Congress on the First Year of Practice Under the Private Securities Litigation Reform Act of 1995 at 2 (1997).

C. Congress's Express Purpose in Enacting SLUSA Was to Ensure that Securities Class Actions Proceed Exclusively in Federal Court

Congress quickly recognized that class action filings in state court were undermining the Reform Act. *See Kircher v. Putnam Funds Trust*, 547 U.S. 633, 636 (2006). Congress enacted SLUSA specifically to close this loophole and thereby "block this bypass of the Reform Act." *Id.* The underlying purpose of SLUSA's enactment was clear: it sought to further implement the goals of the Reform Act by making sure that federal securities class actions are litigated exclusively in federal court. *See Dabit*, 547 U.S. at 82.

From inception to enactment, Congress intended that SLUSA would make federal court the exclusive forum for securities class actions and eliminate securities class action litigation in state courts. Indeed, both houses of Congress,[4] as well as President Clinton in

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[4] *See, e.g.*, H.R. Rep. No. 105-640, at 8–9, 10 ("The purpose of this title is to prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than in Federal, court," and that "[t]he solution to this problem is to make Federal court the exclusive venue for securities fraud class action litigation."); S. Rep. No. 105-182, at 3 (1998) (noting the "disturbing trend . . . [of] a noticeable shift in class action litigation from federal to state courts . . . [and] the dangers of maintaining differing federal and state standards of liability for nationally-traded securities"); *The Securities Litigation Uniform Standards Act of 1997: Hearing on H.R. 1689 Before the Subcomm. on Fin. and Hazardous Materials of the H. Comm. on Commerce*, 105th Cong. 1 (May 19, 1998) (statement of Rep. Tom Bliley, Comm. Chairman) ("[SLUSA]

his signing statement,[5] repeatedly expressed the goal of ensuring that securities class actions be pursued only in federal court. *See generally* Brief for Petitioners at 20–31, *Cyan v. Beaver Cty. Emp. Ret. Fund*, No. 15-1439. The Conference Committee report on SLUSA succinctly captured this unequivocal intent: "[t]he solution to this problem [of plaintiffs attempting to circumvent the Reform Act] is to make Federal court the exclusive venue for most securities fraud class action litigation involving nationally traded securities."[6]

D. State Court Jurisdiction over 1933 Act Class Actions Cannot Be Squared with SLUSA's Purpose

Viewed against this legislative backdrop, there is only one faithful reading of SLUSA's amendments to the text of the 1933 Act's jurisdictional provision: the interpretation advanced by petitioners. A contrary interpretation—that Congress intended to carve out a species of securities class actions *alleging federal claims* from the reach of a comprehensive remedial statutory framework specifically constructed to normalize (and federalize) securities class action litigation—would undermine SLUSA's purpose. This Court should not adopt such an interpretation. *See King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) (noting

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makes Federal court the exclusive venue for securities class actions.")

[5] President William J. Clinton, Statement on Signing the Securities Litigation Uniform Standards Act of 1998, 34 Weekly Comp. Pres. Doc. 2247, 2248 (Nov. 3, 1998) ("[T]he uniform standards provided by this legislation state that class actions generally can be brought only in Federal court, where they will be governed by Federal law.").

[6] H.R. Conf. Rep. No. 105-803, at 15 (1998).

that "[i]f at all possible, [the Court] must interpret the [statute] in a way that is consistent" with the goals of the legislation).

Congress's grant of concurrent state and federal jurisdiction in the original 1933 Act does not suggest that Congress ever intended for securities class actions to proceed in state court. In fact, it did not. Concurrent jurisdiction was desirable when the 1933 Act was enacted so Congress could ensure that smaller, localized cases could continue to proceed in state court—as they had previously under state blue sky laws—while enabling larger cases involving the interstate sale of securities or foreign bonds—which state blue sky laws had difficulty reaching—to be filed in federal court, pursuant to a uniform federal legislative scheme. *See, e.g.*, Thomas Lee Hazen, *Allocation of Jurisdiction Between the State and Federal Courts for Private Remedies Under the Federal Securities Laws*, 60 N.C. L. Rev. 707, 710–11 (1982); 1 Louis Loss, Joel Seligman & Troy Paredes, Securities Regulation Ch. 1.B.6, 1.G–1.G.1 (5th ed. 2015); Elisabeth Keller & Gregory A. Gehlmann, *Introductory Comment: A Historical Introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934*, 49 Ohio St. L.J. 329, 336 (1988) ("The minimal impact of the blue sky laws and the failure of the states to adopt uniform laws clearly led to a demand for federal legislation."). At the time, forum shopping concerns like those at issue today did not apply. The Rules Enabling Act had not yet been enacted and the Federal Rules of Civil Procedure had yet to be adopted, so federal courts applied the same procedural rules as the states in which they sat. *See* Charles E. Clark, *The Challenge of a New Federal Procedure*, 20 Cornell L.Q. 443, 446 (1935).

Further, the class action mechanism was entirely unknown in 1933. It was not until the advent of the "modern class action" as a result of the 1966 revisions to Federal Rule of Civil Procedure 23, *see Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833 (1999), that representative litigation became the model for private plaintiffs to enforce the securities laws. It was as a result of this development, and its subsequent abuse, that targeted federal legislation like the Reform Act and SLUSA became necessary. *Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980) ("That there is a potential for misuse of the class action mechanism is obvious."). As discussed in detail above, Congress passed the Reform Act and SLUSA as a remedy to the class action problem—a problem that was nonexistent at the time of the 1933 Act. Standard canons of statutory construction dictate that SLUSA's specific mandate regarding class action jurisdiction controls over the more general terms of the 1933 Act's jurisdictional grant. *United States v. Estate of Romani*, 523 U.S. 517, 532 (1998) (holding that a "later," "more specific," and more "comprehensive" statute controls).

II. State Courts Do Not Consistently Offer the Substantive and Procedural Protections Afforded to Securities Class Action Litigation in Federal Court

Permitting state courts to exercise jurisdiction over 1933 Act class actions negatively impacts litigants and the fairness and efficiency of 1933 Act class action proceedings. Uniform federal law—including not only the Reform Act, but also the Multidistrict Litigation Act of 1968 and federal procedural rules governing class actions and discovery—provides federal courts with the tools to adjudicate securities class actions efficiently while protecting defendants and absent

class members from meritless claims and abusive tactics. These provisions do not apply or are not uniformly enforced in state courts. Differences among the states, moreover, when coupled with expansive venue provisions for securities class actions, invite plaintiffs to engage in forum shopping.

A. The Reform Act

Defendants in state fora often lack access to the Reform Act's procedural protections, which are applied unevenly at best in state courts.

First, state courts do not consistently apply the Reform Act discovery stay, which provides that "all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss[.]" 15 U.S.C. § 77z-1(b)(1), *accord id.* § 77z-2(f). As detailed in Part III.B, *infra*, discovery is burdensome, intrusive, and generally the most expensive part of civil litigation. When discovery is not properly curtailed, it can pervert incentives for efficient litigation. *See Thorogood v. Sears, Roebuck & Co.*, 624 F.3d 842, 849 (7th Cir. 2010) (Posner, J.) ("One purpose of discovery—improper and rarely acknowledged but pervasive—is it makes one's opponent spend money." (quotation marks, citation, and subsequent history omitted)).

Although some state courts have applied the Reform Act discovery stay, others have not, exposing defendants to the very costs Congress intended to avoid. *Compare* Notice of Order Denying Motion to Stay Proceedings at 7, *Buelow v. Alibaba Grp.*, No. CIV-535692 (Cal. Super. Apr. 1, 2015), Dkt. No. 463 ("[T]he Court finds that a stay of discovery is not warranted. Defendant argues a stay of discovery is automatic under the [Reform Act]. However, Defendant fails to cite a single reported decision in California that the

[Reform Act]'s discovery stay applies to securities class actions filed in state court."), *with Milano v. Auhll*, No. SB 213 476, 1996 WL 33398997, at *3 (Cal. Super. Oct. 2, 1996) ("[T]he motions of the defendants for stays of all discovery [under the Reform Act] must be and hereby are granted as prayed.").[7] Without the discovery stay, defendants face the dilemma of settling even frivolous lawsuits or suffering the considerable burden and expense of discovery while motions to dismiss remain pending.

Second, the Reform Act instructs federal district courts to appoint lead plaintiffs that the court "determines to be most capable of adequately representing the interests of class members." 15 U.S.C. § 77z-1(a)(3)(B). This provision ensures that the plaintiff litigating on behalf of the class—often a public pension fund—has the largest economic interest in the controversy and competent representation. *See* Michael Perino, *Institutional Activism Through Litigation: An Empirical Analysis of Public Pension Fund Participation in Securities Class Actions*, 9 J. Empirical Legal Stud. 368, 390 (2012) ("[P]ublic pension fund participation as lead plaintiffs in securities class actions appears to achieve many of the benefits that . . . Congress anticipated"). State laws typically contain no such protection, which generates a race to the courthouse to reward the first-in-time filer—precisely what Congress sought to avoid in passing the Reform Act. *See* Hon. Leo E. Strine, Jr. *et al.*, *Putting*

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[7] *See also* Benjamin P. Edwards, *Disaggregated Classes*, 9 Va. L. & Bus. Rev. 305, 356–57 (2015) ("[T]he [Reform Act]'s discovery stay does not apply in state court actions . . . ."); Michael Perino, *Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 Stan. L. Rev. 273, 296–97 (1998) ("State courts . . . generally have been reluctant to stay discovery.").

Stockholders First, Not the First-Filed Complaint, 69 Bus. Law. 1, 49–50 (2013) ("As representative litigation grew more common during the twentieth century, the first-filed rule also became widely invoked in determining priority *between representative plaintiffs*." (emphasis in original)). To the extent that state courts choose lead plaintiffs rather than deferring to the first-filed complaint, the appointment of a lead plaintiff often falls to the discretion of the trial court, or at the very least to less precise standards than those set forth in the Reform Act.[8]

Third, the Reform Act targets professional plaintiffs by restricting the number of times a litigant may serve as lead plaintiff to five actions in any three-year period. 15 U.S.C. § 77z-1(a)(3)(B)(vi). No state has an analogous statute, and indeed the problem of serial plaintiffs (and serial counsel) in state court class actions is well documented. H.R. Conf. Rep. No. 104-369, at 31; *see generally* Jessica Erickson, *The New Professional Plaintiffs in Shareholder Litigation*, 65 Fla. L. Rev. 1089 (2013) (describing migration of professional plaintiffs from securities class actions to other types of class actions to avoid the Reform Act). State courts are similarly unbound by the Reform Act's requirement that federal plaintiffs certify their securities transactions and their suitability to lead the class under penalty of sanction, 15 U.S.C. § 77z-1(a)(2), or its prohibition on class representatives

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[8] *E.g.*, *Robinson v. EMI Music Distribution, Inc.*, No. CIV. A. L-10462, 1996 WL 495551, at *5 (Tenn. Cir. Ct. July 8, 1996) (selecting lead plaintiff without reference to a legal standard); *In re Kinder Morgan, Inc. Shareholders Litig.*, No. 06 C 801, 2006 WL 2271243, at *2 (Kan. Dist. Ct. Aug. 1, 2006) (selecting lead plaintiff based on counsel's reputation without reference to a legal standard).

receiving bounty payments beyond their pro rata shares of any judgment, 15 U.S.C. § 77z-1(a)(4).

Finally, the Reform Act forces courts to act as a bulwark against abusive class action litigation practices by attorneys through mandatory consideration of Rule 11 at the conclusion of the case. 15 U.S.C. § 77z-1(c). Few (if any) states have enacted similar mandatory provisions.[9]

B. The Multidistrict Litigation Act of 1968

As Congress recognized in enacting SLUSA, parallel litigation in multiple jurisdictions "increase[s] the overall cost of litigation." H.R. Conf. Rep. No. 105-803, at 14. State court defendants, however, lack access to the federal Multidistrict Litigation ("MDL") Act of 1968, which created the Judicial Panel on Multidistrict Litigation to oversee the transfer of similar class (and other) actions filed in multiple districts to a single court for coordinated pretrial proceedings. *See* 28 U.S.C. § 1407.

By their nature, securities class actions pending in multiple federal districts are considered prime candidates for centralization through the MDL process. Emery G. Lee III, *et al.*, *Multidistrict Centralization: An Empirical Study*, 12 J. Empirical Legal Stud. 211, 230 (2015) ("Proceedings in which class allegations are raised are substantially more likely to see a motion for transfer granted."). In cases of overlapping complaints in multiple fora, transfer by the Judicial Panel on Multidistrict Litigation is crucial because parallel (and duplicative) litigation increases the burden for a

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[9] *But see* Tex. Ins. Code Ann. § 541.253 (encouraging courts' diligence in sanctioning litigants in connection with class action abuses)

defendant by multiplying defense costs, multiplying the burdens of discovery, and creating the problem of inconsistent rulings with preclusive effects. Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. Rev. 461, 470–98 (2000) (cataloguing problems with parallel class actions, including "pressure to settle," "informational deficiencies," "waste of resources," and "preclusion problems"); H.R. Rep. No. 105-640, at 10 (noting that after the passage of the Reform Act "there has also been an increase in parallel litigation between state and federal courts in an apparent effort to avoid the federal discovery stay or other provisions of the Act" and that the increase "has the potential not only to undermine the intent of the Act, but to increase the overall cost of litigation to the extent that the Act encourages the filing of parallel claims" (citation omitted)).

There is no interstate equivalent to the federal MDL Act. Without any effective means to centralize parallel interstate class actions, defendants faced with multiple proceedings must rely on discretionary stays and common law doctrines such as *forum non conveniens* and the first-filed rule, which, as Chief Justice Leo E. Strine of the Delaware Supreme Court has observed, are "ineffective counterbalances" to multiplicative multi-forum class actions. Strine, 69 Bus. Law. at 41–42. The lack of a state MDL analog harms plaintiffs and absent class members as well. They likewise face the risk of preclusive legal rulings that are inconsistently or unfavorably determined by courts presiding over uncoordinated proceedings in multiple fora. Wasserman, 80 B.U. L. Rev. at 484–87; *see generally* Tobias Barrington Wolf, *Preclusion in Class Action Litigation*, 105 Colum. L. Rev. 717 (2005). Competing plaintiffs' counsel, moreover, may engage in a race to settle quickly without providing adequate

information to the class. *See* Wasserman, 80 B.U. L. Rev. at 478; *see also* Elizabeth Cosenza, *The Persistent Problem of Multi-Forum Shareholder Litigation: A Proposed Statutory Response to Reshuffle the Deck*, 10 Va. L. & Bus. Rev. 413, 418–20 (2016).

C. Federal Rule of Civil Procedure 23(f) Appeals

Litigants in 1933 Act class actions pending in state court often lack access to any meaningful appellate review of erroneous class certification orders. In federal court, Rule of Civil Procedure 23(f) allows for immediate petitions to review interlocutory orders that grant or deny class certification. This provision affords defendants a quick and efficient means to seek relief from the "unwarranted or hydraulic pressure to settle" generated by improper certification of an immense class of securities purchasers, *see Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001), by seeking redress directly from the federal courts of appeals, rather than having to face potentially unnecessary discovery and trial before having any opportunity to appeal. Rule 23(f) likewise protects plaintiffs and absent class members in so-called "death knell" cases where the denial of class certification will "doom[] the suit as a practical matter." *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834 (7th Cir. 1999). Many states do not provide for similar interlocutory appeals at all, and others permit only appeals of certain dispositions or with discretionary leave from the trial court. *See, e.g.*, Ark. R. App. P. Civ. 2 (discretionary appeal of certification orders); Ill. S. Ct. R. 308 (eff. July 1, 2017) (trial court may certify order for interlocutory appeal); *Stetser v. TAP Pharm. Prods., Inc.*, 165 N.C. App. 1, 10–11 (2004) (orders *denying* class certification generally are

immediately appealable as of right under N.C. Gen. Stat. § 7A-27, but orders *granting* class certification are not); *but see* Ala. Code § 6-5-642 (certification orders appealable as of right).

D. Federal Pleading Standards

State court pleading rules can expose defendants in state court 1933 Act class actions to discovery and protracted litigation, while similarly situated defendants in federal court obtain early dismissal of identical claims. Many states have rejected the "facial plausibility" standard that federal courts apply to pleading claims under Rule 8(a), and continue to allow claims to proceed past a motion to dismiss on more threadbare pleadings that would never survive a motion to dismiss in federal court. *Compare, e.g., Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556–57 (2007) (adopting standard requiring plaintiffs to allege sufficient factual matter to render their claims plausible), *with, e.g., McCurry v. Chevy Chase Bank, FSB*, 233 P.3d 861, 862–63 (Wash. 2010) (*en banc*) (rejecting *Twombly* standard, which is "more difficult to satisfy," and holding that claims may proceed where "it is *possible* that facts could be established to support the allegations in the complaint" (emphasis in original)).

In practice, state pleading rules that sustain complaints with minimal factual content may impose significant costs on defendants in all classes of cases because "it is only by taking care to require allegations that reach the level suggesting [plausibility] that [courts] can hope to avoid the potentially enormous expense of discovery in cases with no 'reasonably founded hope that the [discovery] process will reveal relevant evidence.'" *Twombly*, 550 U.S. at 559–60 (third alteration in original) (quoting *Dura Pharms.*,

Inc. v. Broudo, 544 U.S. 336, 347 (2005)). This pleading discrepancy is particularly problematic in 1933 Act class actions as 1933 Act claims do not require plaintiffs to plead or prove fraud to state a cause of action. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983). Many 1933 Act complaints explicitly disavow allegations of fraud or otherwise do not "sound in fraud," thereby evading standards under state laws analogous to Federal Rule of Civil Procedure 9(b). *E.g.*, *Fortunato v. Akebia Therapeutics, Inc.*, No. 1584CV02665, 2017 WL 716356, at *10 (Mass. Super. Feb. 21, 2017) ("Since [plaintiff] has alleged only negligent misrepresentation [in his 1933 Act claim] and expressly disclaimed any allegation of intentional or reckless fraud, the heightened pleading standard of [Massachusetts] Rule 9(b) does not apply.").

E. Discovery Limitations Under the Federal Rules of Civil Procedure

Federal procedural rules now limit the scope, amount and duration of discovery; state rules frequently do not.

For example, Federal Rule of Civil Procedure 26(b)(1) was amended in 2015 to specify that discovery must be "proportional to the needs of the case," and the amendment is already having a significant impact in limiting the scope of discovery in federal court.[10] As of June 2017, however, just three states have

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[10] *See, e.g.*, Samantha L. Southall, *Defining Proportionality: Amended Rule 26's First 6 Months*, Law 360 (June 1, 2016), https://www.law360.com/articles/801934/defining-proportionality-amended-rule-26-s-first-6-months; Richmond T. Moore, *Amended Rule 26 Limits Precertification Discovery*, Law360 (Dec. 15, 2015), https://www.law360.com/articles/736148/amended-rule-26-limits- precertification-discovery.

substantially adopted the 2015 amendments, with another four considering new rules in response.[11] This leaves 26 states that continue to follow the old rule of allowing discovery of anything relevant to the subject matter of the case, and another 17 that follow their own rule or have no rules at all regarding electronic discovery—the source of much of the cost and burden of modern discovery.[12]

The federal rules also limit discovery in other ways, including by presumptively limiting the number and length of depositions and the number of interrogatories. *See* Fed. R. Civ. P. 30 (ten seven-hour depositions per side), Fed. R. Civ. P. 33 (25 interrogatories). These presumptive limits contribute to efficiency and often reduce costs.[13] Conversely, many states are much more permissive, and place no presumptive limits on written or deposition discovery.[14]

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[11] *See* 50 States: Civil Procedure Rules in State Court – Part 2, The Ediscovery Blog (June 14, 2017), http://www.theediscoveryblog.com/2017/06/14/50-states-civil-procedure-rules-state-court-part-2/ (surveying state discovery rules in light of the 2015 amendments).

[12] *Id.*

[13] *See* Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. Rev. 517, 521 (1998) (explaining that "experienced lawyers, representing both plaintiffs and defendants, [when] discuss[ing] current discovery practice and its weaknesses, observ[ed] principally that problems of expense centered on the length and cost of depositions and the breadth of document production").

[14] *See, e.g.*, The Foundation of the International Association of Defense Counsel, State Best Practices Survey (2d ed. Dec. 15, 2012) (surveying all 50 states, including, *e.g.*, Alabama (40 interrogatories and no limits on depositions), California (35 interrogatories and no limits on deposition number in cases exceeding $25,000), Delaware (no limits on either), Florida (30

F. Expansive Venue and Personal Jurisdiction Rules for 1933 Act Class Actions Encourage Forum Shopping

Given the differences between and among federal and state court rules—including on discovery, the selection of class representatives and pleading standards, and other matters, Part II.A–E, *supra*—permitting state courts to exercise jurisdiction over 1933 Act class actions encourages forum shopping. The 1933 Act's broad jurisdiction and venue provisions, which are sometimes (albeit inconsistently) applied in state courts give plaintiffs' attorneys the practical ability to search among available fora for the most permissive jurisdictions in which to file 1933 Act class actions.

1933 Act suits can be brought "in the district where the offer or sale [of the security] took place," 15 U.S.C. § 77v, which potentially permits suit wherever a securities purchaser resides. Because that provision also allows for nationwide service of process, the risk of forum shopping is substantial. That risk is mitigated in federal courts which, unlike state courts, uniformly apply the Reform Act's heightened pleading standards and the facial plausibility test under Rule 8(a), and have the means—through the MDL statute or the federal transfer of venue statutes, *see* 28 U.S.C. §§ 1404, 1407—to move a lawsuit to the most appropriate forum. *See* Part II.A–E *supra*. Some states, however, have imported the 1933 Act's nationwide service of process provision wholesale, meaning that an issuer and its officers and directors can be haled into court

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interrogatories and no limits on depositions), Nebraska (50 interrogatories and no limits on depositions), North Dakota (no limits on either), South Dakota (no limits on either), and Vermont (no limits on either)).

there, no matter how little connection they have to the state. *See Lakewood Bank & Trust Co. v. Superior Ct.*, 129 Cal. App. 3d 463, 470–71 (1982) ("[A] California court may obtain jurisdiction over [the out-of-state defendant] if it can be shown that a claim against [the defendant] is either brought to enforce any liability or duty created by the Securities Act of 1933 or is fundamentally derived from and dependent on such claim.").[15] As a result, plaintiffs' attorneys can game the 1933 Act's jurisdictional provisions to file class actions in favorable state courts without regard to traditional notions of personal jurisdiction. So long as 1933 Act class actions can continue to be brought in state court, issuers and their officers and directors face a serious risk of having to defend lawsuits in distant jurisdictions with which they have little to no connection, and which apply lax pleading rules and minimal protections for securities defendants.[16]

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[15] Courts in some states have required plaintiffs to establish personal jurisdiction over individual defendants without the 1933 Act's nationwide service provision. *See Kelly v. McKesson HBOC, Inc.*, No. CIV A.99C-09-265WCC, 2002 WL 88939, at *19–20 (Del. Super. Ct. Jan. 17, 2002) (finding that Delaware procedural law applies, and "Plaintiffs cannot rely upon the nationwide service provisions of the Securities Act to obtain jurisdiction over the individual Defendants"). But the lack of uniformity among the states on this question merely invites plaintiffs to file 1933 Act class actions in those jurisdictions that take the most expansive approach to exercising personal jurisdiction over defendants.

[16] *See* Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 652–53 (2006) ("We began [our empirical study] by asking what factors affected plaintiff and defendant choice of forum. . . . We found for plaintiff attorneys that expectations about judicial predispositions [in state fora] were related to attorney perceptions of favorable substantive law and favorable discovery rules in the state forum they selected.").

* * *

In sum, if the Court were to permit state courts to exercise jurisdiction over 1933 Act class actions, issuers, officers, and directors would face the prospect of multiple overlapping litigations with limited or inconsistently applied procedural protections. In federal court, a single consolidated class action typically proceeds in a single district—directed there, if necessary, by the Judicial Panel on Multidistrict Litigation—with a single lead plaintiff represented by a single lead counsel selected by the court in the competitive process laid out in the Reform Act. Discovery in federal court is stayed pending a determination on the motion to dismiss; if the motion is denied, discovery—and then each subsequent facet of the litigation process—proceeds in a rational way in a single forum. By contrast, under the ruling of the California courts below, multiple competing claims on behalf of multiple competing and overlapping putative classes could be filed in multiple jurisdictions. Those competing cases would often be litigated by the plaintiffs and plaintiffs' counsel who happened to file their claims in a particular jurisdiction first. Defendants in those competing state court actions would face the prospect of early discovery in multiple jurisdictions before decisions on motions to dismiss, which may be subject to differing procedural standards. This was not—and cannot be—what Congress envisioned in passing SLUSA.

III. U.S. Corporations, Their Officers and Directors, and U.S. Capital Markets Are Harmed by the Prospect of State Court Jurisdiction over 1933 Act Class Actions

Empirical evidence shows that confusion regarding U.S. securities law discourages participation in the U.S. capital markets. In particular, many foreign issuers are deterred from listing on U.S. exchanges because the legal environment is unpredictable, escalating litigation costs often force issuers to settle meritless lawsuits, and overwhelming discovery imposes a tremendous burden on issuers. These concerns are exacerbated by the potential for class action litigation in state court, where the scope of discovery has the potential to be much broader than in federal court.

A. The Uncertainty Regarding the Legal Landscape for Securities Class Actions Discourages Participation in U.S. Capital Markets

The uncertain legal environment deters foreign companies from listing on U.S. exchanges for fear that they will be subject to potentially crippling securities liability. Throughout the 2000s, the United States lost its global share of initial public offerings to European and Asian markets. *See* Michael R. Bloomberg & Charles E. Schumer, *Sustaining New York's and the US' Global Financial Services Leadership* 12 (2007). When senior executives were interviewed about why they chose to avoid the United States, many focused on the lack of a "fair and predictable legal environment" stateside, which they said contrasted with other markets, such as the United Kingdom. *Id.* at 16. It is not surprising, then, that "U.S. securities class action lawsuits" have been identified "by both academics and policy makers as one of the most important deterrents

to foreign firms listing in the U.S." Amar Gande & Darius P. Miller, *Why Do U.S. Securities Laws Matter to Non-U.S. Firms? Evidence from Private Class-Action Lawsuits* (Oct. 2011) (unpublished manuscript) *available at* http://www.baylor.edu/business/finance/doc.php/229667.pdf. When the threat of expensive and vexatious class action litigation drives firms from U.S. capital markets, it damages the economy more generally; since "liquidity attracts liquidity" and thereby spurs economic growth, there is a "paramount public interest . . . in not deterring foreign issuers from offering or listing securities in the United States." John C. Coffee, Jr., *Fear of the U.S. Market*, National Law Journal, December 6, 2006, p. 13.

Indeed, this precise problem was a key motivator for both the Reform Act and SLUSA. In Reform Act hearings, former SEC Chairman Richard C. Breeden explained that "[b]ased on conversations with potential issuers of securities all over the world, the fear of litigation inhibits foreign firms from participating in the U.S. market[s]."[17] Similarly, in hearings leading to SLUSA's passage, a former SEC Commissioner explained that the then-current structure of securities class actions was counterproductive to the goal of "encouraging national and international securities offerings and listing," and he specifically identified "disparate, and shifting, state litigation procedures" as a main factor intimidating issuers from entering U.S. capital markets. *Securities Litigation Uniform Standards Act of 1998—Conference Report*, 144 Cong. Rec.

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[17] *See Common Sense Legal Reform Act: Hearings on H.R. 10 Before the Subcomm. on Telecommunications and Finance of the H. Comm. on Commerce*, 104th Cong., 1st Sess. 221, 224 (1995) (statement of former SEC Chairman Richard C. Breeden).

S12446 (reciting statement of former SEC Commissioner Steven Waller).

B. The Costs Associated with Litigating Class Actions in State Court Are Potentially More Substantial and Debilitating than Litigating in Federal Court

The costs of litigating class actions are—as the Court has recognized on numerous occasions—substantial and debilitating. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable . . . [and] defendants will be pressured into settling questionable claims."); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008) (stating prospect of "extensive discovery" may enable "plaintiffs with weak claims to extort settlements from innocent companies"); *see also* Part II, *supra*. These problems are magnified when securities class actions are litigated in state court, both because the procedural protections of the Reform Act are applied unevenly and because the scope of discovery may be much broader than in federal court.

Discovery costs are by far the highest costs in litigation. At the time the Reform Act was passed, it was reported that the cost of discovery could often account for eighty percent of total litigation costs,[18] and those

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[18] James Hamilton, Fed. Sec. L. Rep., Private Securities Litigation Reform Act of 1995: Law & Explanation, at 78–79 (1996) (reporting that discovery accounts for approximately eighty percent of defendants' total litigation costs in securities class action lawsuits); Edward Brodsky, *Discovery Abuses: A Shifting Target?; Corporate and Securities Litigation*, 217 N.Y.L.J. 33

costs have continued to increase.[19] These costs are compounded significantly by lost employee hours, interrupted business activities, and increased capital costs, which can "dwarf the expense of attorneys' fees"[20] and have been recognized by the Court as a significant harm associated with securities class actions. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 742–43 (1975) (describing "the threat of extensive discovery and disruption of normal business activities" posed by securities class actions).

These costs are a key reason that defendants in securities class actions face intense pressure to settle. This Court has noted that extensive, class-wide discovery can have an "*in terrorem* increment" forcing settlement. *Id.* at 741. The pressure to settle was an important consideration during the passage of the Reform Act, particularly because the pressure to settle is not commensurate with the underlying merits of the case. *Developments in the Law—The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives*, 113 Harv. L. Rev. 1806, 1812 (2000) (noting that meritless suits are "as costly to litigate as legitimate claims"). For officers and directors, settlements are predicated on the amount of directors and officers ("D&O") insurance more than any other factor. *See* Alexander, 43 Stan. L. Rev. at 550. These conclusions

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(1997) (stressing that discovery can often account for eighty percent of a defendant's securities litigation costs).

[19] *E.g.*, Karel Mazanec, *Capping E-Discovery Costs: A Hybrid Solution to E-Discovery Abuse*, 56 Wm. & Mary L. Rev. 631, 639–40 (2014).

[20] A.C. Pritchard, *Markets as Monitors: A Proposal to Replace Class Actions with Exchanges as Securities Fraud Enforcers*, 85 Va. L. Rev. 925, 953 (1999).

led Judge Friendly to note that such cases can lead to "blackmail settlements." Hon. Henry J. Friendly, Federal Jurisdiction: A General View 120 (1973); *see also* James A. Henderson, Jr., Comment, *Settlement Class Actions and the Limits of Adjudication*, 80 Cornell L. Rev. 1014, 1021 (1995) ("[S]ettlement class action agreements more closely resemble the payment of blackmail by a corporation whose very survival is threatened by what might well, if taken to trial, prove to be groundless claims.").

As detailed in Part II, *supra*, the scope of discovery has the potential to be far more extensive in state court than federal court, especially because forum-shopping plaintiffs can look for the state with the lowest standards.[21] It is not surprising, then, that defendants often settle earlier and for larger amounts in state courts like California.[22] If defendants are

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[21] *See* G. Chin Chao, *Securities Class Actions and Due Process*, 1996 Colum. Bus. L. Rev. 547, 550–51 (describing the resulting "race to the bottom" settlement process in state courts); Patrick M. Garry *et al.*, *The Irrationality of Shareholder Class Action Lawsuits: A Proposal for Reform*, 49 S.D. L. Rev. 275, 276 (2005) (highlighting increase in filings in Jefferson County, Mississippi).

[22] *Compare* Priya Cherian Huskins, *IPO Companies, Section 11 Suits and California State Court*, D&O Notebook: Woodruff-Sawyer & Co. (Apr. 26, 2016), https://wsandco.com/do-notebook/ipo-companies-section-11-suits-california-state-court/ (noting seven recent 1933 Act Section 11 cases settled in California for an average of approximately $8 million), *with* Cornerstone Research, Securities Class Action Settlements: 2016 Review and Analysis 11 fig.10 (2017) (noting a median settlement value of $4 million across state and federal courts for 1933 Act Section 11 cases). *See also* Woodruff-Sawyer & Co., *Databox Year-End Securities Class Action Report* (Feb. 2017), https://wsandco.com/wp-content/uploads/2017/05/CorpEx-DO-DataBoxFlashReport-Q4-2016-SF-021317-wCover.pdf (Section 11 cases in California have "an average time to settlement of 1.6 years as compared to 2.6 years for suits

forced to litigate securities class actions in state court, the problems Congress was trying to prevent when it passed the Reform Act and SLUSA (which the Court has often noted as significant issues) would only be exacerbated.[23]

C. Officers and Directors Are Forced to Waste Time Focusing on Vexatious Litigation to the Detriment of Their Shareholders, Their Employees, and Their Companies

The costs of litigating 1933 Act class actions in state court disproportionately affect directors and officers. Directors and officers are named as defendants in state court class actions asserting claims under Section 11 of the 1933 Act, 15 U.S.C. § 77k(a), with near uniformity. For example, individual officers or directors were defendants in more than 95% of the 1933 Act class actions filed in California state courts that petitioners collected—in 42 of 44 total cases. *See* Petition for Writ of Certiorari, Appendix I, *Cyan v. Beaver Cty. Emp. Ret. Fund*, No. 15-1439.

Directors and officers are also a natural focus of certain types of discovery, such as depositions. This focus directly undermines the ability of officers and directors to perform their duties to shareholders, because they must expend significant time and resources preparing for and traveling to depositions, and being deposed. This problem is particularly acute in state

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filed in federal courts" and an average settlement value of $8.8 million).

[23] *See* Brief of *Amici Curiae* Law Professors in Support of Petition for a Writ of Certiorari at 12–13, *Cyan v. Beaver Cty. Emp. Ret. Fund*, No. 15-1439 (comparing federal and state court outcomes in 1933 Act class actions).

court, not only because of the general lack of limits on depositions, *see* Part II.E, *supra*, but also the fact that Section 11 class actions are filed in state courts for forum shopping reasons that have little consideration for whether a particular defendant has any nexus to a state. For example, in many California state court cases asserting Section 11 claims, neither the company's headquarters nor place of incorporation is in California. *See, e.g.*, Complaint at 4, *Cervantes v. Dickerson*, No. CIV-53768 (Cal. Super. 2015), Dkt. No. 1 (1933 Act class action complaint against Etsy, Inc., a Delaware corporation headquartered in Brooklyn, New York); *Braun v. NRG Yield*, No. BCV-16-100867 (Cal. Super. 2016) (as disclosed in its 2016 Form 10-K, defendant is a Delaware corporation headquartered in Princeton, New Jersey). As a result, directors and officers are often forced to travel far from the company nerve center to defend against vexatious litigation, which inhibits their ability to perform their intended roles. When the costs to companies (and, by extension, their shareholders) from loss of director and officer time and attention are layered on top of the enormous costs of class action discovery, there is overwhelming pressure to settle 1933 Act class actions in diffuse state courts, regardless of the merits of the case.

The disproportionate impact on directors and officers also negatively affects shareholders, consumers, and the economy as a whole. It is axiomatic that securities class actions inflate the cost of D&O insurance and affect companies' bottom lines, and that those costs are inevitably passed on to consumers in the form of higher prices for goods and services.[24] But

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[24] Donald C. Langevoort, *Capping Damages for Open Market Securities Fraud*, 38 Ariz. L. Rev. 639, 648 (1996) ("[N]early all the money paid out as compensation in the form of judgments and

there are less celebrated negative externalities as well. Recent studies have suggested that securities litigation is correlated with significant decreases in capital expenditures and investments in research and development, which are key drivers of economic growth. *See, e.g.*, Matteo Arena & Brandon Julio, *The Effects of Securities Class Action Litigation on Corporate Liquidity and Investment Policy*, 50 J. Fin. & Quantitative Analysis 251, 272-73 (2015); Don M. Autore *et al.*, *The Effect of Securities Litigation on External Financing*, 27 J. Corp. Fin. 231 (2014). Further, as this Court recognized in *Dabit*, litigation risk also dissuades qualified individuals from serving as directors in the first place, thereby depriving companies of top talent and further hindering productivity. *See Dabit*, 547 U.S. at 81 (citing H.R. Conf. Rep. No. 104-369, at 31–32 and noting abusive securities class actions "resulted in extortionate settlements, chilled any discussion of [public companies'] future prospects, and deterred qualified individuals from serving on boards of directors."); *see also* H.R. Rep. No. 104-50(I), at 20 (1995) ("Fear of litigation keeps companies out of the capital markets," and "businesses suffer as auditors and directors decline engagements and board positions.").

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settlements comes, one way or another, from investors themselves.").

CONCLUSION

For the reasons set forth herein, this Court should hold that state courts lack subject matter jurisdiction over covered class actions alleging only 1933 Act claims.

Respectfully submitted,

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In the
Supreme Court of the United States

CYAN, INC., ET AL.,

Petitioners,

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, ET AL.

Respondents.

On Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District

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BRIEF FOR DRI – THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI – The Voice of the Defense Bar, is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to promote the role of defense attorneys, to address issues germane to defense attorneys and their clients, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system fairer, more consistent, and more efficient. See http://www.dri.org/About. To promote these objectives, DRI participates as amicus curiae in cases that raise issues important to its membership, their clients, and the judicial system. This is one of those cases.

DRI's interest in this case stems from its members' extensive involvement in civil litigation, including securities class actions. DRI's members are regularly called upon to defend their clients in lawsuits brought pursuant to federal securities laws, which contain a number of protections to curb systemic abuses by plaintiffs. If the decision below is affirmed, however, plaintiffs will continue to bring

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties has consented to this filing.

and litigate class actions for claimed violations of the Securities Act of 1933 in state courts, where federal protections are not uniformly enforced and applied. No doubt, a decision that follows the rationale of the Superior Court of the State of California, County of San Francisco ("Superior Court") will result in a further increase in the filing of "strike suits" – meritless suits brought to coerce an expensive settlement – in state courts.

DRI has a strong interest in ensuring that the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), which eliminated state-court jurisdiction over "covered class actions" raising only 1933 Act claims, is strictly enforced pursuant to its plain terms. 15 U.S.C. §77(v). The very intent of the SLUSA was to eliminate the federal-to-state-court shift observed after the Private Securities Litigation Reform Act of 1995 was enacted and plaintiffs flocked to state courts to avoid the Reform Act's heightened pleading requirements. Yet the decision below effectively nullifies a portion of the SLUSA by allowing plaintiffs to maintain these class actions in state court and circumvent the federal rules. This threatens to open the floodgates of litigation in derogation of the Legislature's intent to eliminate state court jurisdiction of large class actions alleging only 1933 Act claims. This, in turn, directly affects the fair, efficient, and consistent functioning of our civil justice system and, as such, it is of vital interest to the members of DRI.

DRI has a unique vantage point to help this Court understand the importance of proper adherence to the outer bounds of state courts'

jurisdiction over securities class actions, not only from a legal standpoint, but also from practical and economic standpoints as well. DRI, alone and in conjunction with other legal organizations, has conducted seminars studying these lawsuits long before this case. DRI has also compiled a Class Action Compendium designed to provide civil defense lawyers and corporate counsel with an understanding of the intricacies of class action practice and procedure. These and other seminars and writings on class action litigation reveal DRI's longstanding interest in mass action litigation and its knowledge about this litigation and its abuses. In seeking to rectify litigation abuses and to improve the civil justice system, DRI has submitted testimony regarding the federal rules of civil procedure, potential legislation relating to class actions, and addressed other issues arising from class action litigation with federal and state legislators, courts, and rule-making bodies.

Based on its members' extensive real-world experience, DRI is uniquely suited to explain why the better approach is to adhere to the SLUSA's clear elimination of state-court jurisdiction over covered class actions alleging only 1933 Act claims and allow those actions to proceed exclusively in a federal forum with securities laws designed to carefully balance the need to protect innocent investors from fraudulent practices with the need to protect innocent defendants from meritless, yet costly, lawsuits.

SUMMARY OF THE ARGUMENT

"The private securities litigation system is too important to the integrity of American capital markets to allow this system to be undermined by those who seek to line their own pockets by bringing abusive and meritless suits." H.R. Conf. Rep. No. 104-369, 31 (1995). It is for this precise reason that Congress has enacted a number of federal securities laws to balance the competing concerns of protecting investors against fraud while curtailing extortionist settlements from innocent defendants.

One of those laws was the Private Securities Litigation Reform Act of 1995, which, as a co-sponsor succinctly summarized, was intended to "return some fairness and common sense to our broken securities class action litigation system, while continuing to provide the highest level of protection to investors in our capital markets." S. Rep. No. 104-98,4 (1995), quoting Statement of Senator Pete Domenici, Hearing on Securities Litigation Reform Proposals, Subcommittee on Securities, Senate Committee on Banking, Housing and Urban Affairs, March 2, 1995. The Reform Act made several amendments to the Securities Act of 1933 and the Securities Exchange Act of 1934, calling for heightened pleading requirements for private securities fraud actions, certification requirements for lead plaintiffs, and automatic discovery stays during the pendency of a motion to dismiss. It also placed limitations on recoverable damages and attorney's fees, and established a safe-harbor provision for forward-looking statements to insulate defendants from liability. H.R. Conf. Rep. No. 104-369, pp. 42-47

(1995); 15 U.S.C. §77z-2(c)(1)(A)(i), §78u-5(c)(1)(A)(i), §78u-4(b).

Unfortunately for defendants, plaintiffs found a loophole: file their securities suits in state courts in order to avoid the Reform Act's heightened requirements. Like the lawsuit at issue here, the bulk of these suits have been brought in California. Congress responded to this noticeable trend by enacting the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), which amended the Securities Act of 1933 to eliminate state court jurisdiction for "covered class actions" alleging state-law securities claims.

There is no dispute that this case is a "covered class action" – statutorily defined as any damages action on behalf of more than 50 people. 15 U.S.C. §77p(f)(2). Nonetheless, the decision below allowed Respondents' lawsuit, which alleged only violations of the 1933 Act, to proceed in a California state court. In this way, the opinion below threatens to strip the Reform Act of its protections by allowing plaintiffs to litigate covered class actions in state court rather than in a federal forum carefully designed to protect innocent defendants. And clever plaintiffs will not just file in any state court – they will forum shop for "magnet" or "magic" state jurisdictions – certain courts with relaxed rules and hostility to out-of-state defendants. In magnet jurisdictions, "state court judges are less careful than their federal court counterparts about applying the procedural requirements that govern class actions[,]" a phenomenon Congress noted when passing the Class Action Fairness Act (CAFA) in 2005. S. Rep. No. 109-

14, 13-24 (2005). In plaintiff-friendly jurisdictions, securities class actions frequently result in extortionist settlements.

By making federal court the exclusive forum for class actions of this nature, Congress intended that the SLUSA would ensure that the safeguards of the Reform Act are enforced uniformly throughout the country. Yet under the decision below, plaintiffs now have a roadmap to avoid the federal forum and the Reform Act's tailor-made protections for defendants. This, in turn, leads to an increase in "strike suits" brought by "professional plaintiffs," for no other reason than to extract a settlement regardless of the lack of merit of the underlying claims. This contravenes a key purpose of securities legislation for the last eighty-plus years.

ARGUMENT

I. Through Its Enactment Of The Securities Litigation Uniform Standards Act Of 1998, Congress Intended That "Covered Class Actions" Alleging Only Violations Of The Securities Act Of 1933, Such As The One At Issue, Be Litigated In A Federal Forum Subject To Protective Laws Uniformly Applied.

The historical framework of securities legislation, from the Securities Act of 1933 to the Securities Litigation Uniform Standards Act of 1998, evidences a legislative intent to curb abuses attendant with securities class action litigation, and culminates in a statutory requirement that certain class actions, such as the one at issue here, be litigated in a federal forum governed by protective laws that are consistently applied.

A. From 1933 To 1995, Securities Legislation Was Marked By Concurrent Jurisdiction In State And Federal Courts.

Out of the Stock Market Crash of 1929 arose the Securities Act of 1933 ("1993 Act" or "Act"), legislation "designed to provide investors with full disclosure of material information concerning public offerings[.]" *Ernst & Ernst v. Hochfielder*, 425 U.S. 185, 195 (1976); *Merrill Lynch, Pierce, Fenner & Smith Inc v. Dabit*, 547 U.S. 71, 78 (2006). "[P]rimarily concerned with the regulation of new offerings[,]" the 1933 Act created a cause of action for false statements made in connection with the public offering of stocks. 15 U.S.C. §77*l*(a)(2). Section 22(a) of the 1933 Act provided for concurrent jurisdiction in both state and federal courts over claims arising under the Act. Section 22(a) also expressly stated that claims brought in state court were not subject to removal to federal court: "[N]o case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States." *Id.* In practice, Section 22(a)'s non-removal provision worked to preclude cases brought in state court under the 1933 Act from being removed to federal court under 28 U.S.C. § 1441(a) (providing for a defendant's removal to federal court "any civil action brought in a State court of which the district courts of the United States have original jurisdiction" unless "as otherwise provided by an Act of Congress[.]").

Investors were granted further protections from fraud transpiring in the securities exchange setting through Congress' enactment of the Securities

Exchange Act of 1934 ("1934 Act"). While the 1934 Act provided for broader regulations than the 1933 Act, the 1934 Act granted federal courts "exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder." 15 U.S.C. §78aa(a). While "[t]he legislative history of the Exchange Act elucidates no specific purpose on the part of Congress" in conferring exclusive federal jurisdiction, *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 383 (1996), Congress sought "'to achieve greater uniformity of construction and more effective and expert application of that law.'" *Id.*, quoting *Murphy v. Gallagher*, 761 F.2d 878, 885 (CA 2 1985).

In light of the 1933 Act and the 1934 Act, securities regulation and litigation was marked by a dual federal-state framework. That all changed, however, after Congress' passage of the Private Securities Litigation Reform Act of 1995 ("Reform Act") (codified in part at 15 U.S.C. §77z-1, §78u).

B. The Number Of Securities Class Actions Filed In State Courts Increased Dramatically As Plaintiffs Sought To Avoid The Protections Granted To Defendants By The Private Securities Litigation Reform Act Of 1995.

The Reform Act was aimed at curbing a number of abusive practices by plaintiffs in securities class action litigation. The drafters of the Reform Act hoped that it would "promote uniformity in the securities market" by preventing "'strike suits' –

meritless class actions that allege fraud in the sale of securities." *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 107 (2d Cir. 2001), citing H.R. Conf. Rep. No. 105-803 (1998). As the Senate Committee on Banking, Housing, and Urban Affairs noted, oftentimes these strike suits are "based on nothing more than a company's announcement of bad news, not evidence of fraud." S. Rep. No. 104-98, 4 (1995). Yet they "increase the cost of raising capital and chill corporate disclosure[.]" *Id.* And defending strike suits often forces defendants into settlement of even meritless claims. H.R. Conf. Rep. No. 104-369 (1995).

The Reform Act also sought to address abuses triggered by the emergence of "professional plaintiffs" – individuals who repeatedly appear as lead plaintiffs in securities class action lawsuits for no reason other than to receive "bounty payment or bonuses." *Id.* at 32-33. Those individuals, a House Conference Committee Report aptly reasoned, should not be permitted to act as lead plaintiffs:

> The Conference Committee believes these practices have encouraged the filing of abusive cases. Lead plaintiffs are not entitled to a bounty for their services. Individuals who are motivated by the payment of a bounty or bonus should not be permitted to serve as lead plaintiffs. These individuals do not adequately represent other shareholders-in many cases the "lead plaintiff" has not even read the complaint.

Id. at 33.

The legislature attempted to cure this problem by adding several new sections to the 1933 and 1934 Acts. First, the Reform Act required a lead plaintiff to file a sworn statement with the complaint certifying, among other things, that he or she (1) reviewed and authorized the filing of the complaint, (2) did not purchase the securities at the direction of counsel in order to participate in the lawsuit, and (3) is willing to serve as the lead plaintiff on behalf of the class. 15 U.S.C. §77z-1(a)(3)(B). The Reform Act also required that class counsel by retained by the most adequate plaintiff in hopes that "the plaintiff will choose counsel" rather than "counsel choosing the plaintiff." H.R. Conf. Rep. No. 104-369, p 35 (1995).

The Reform Act also addressed "fishing expedition" lawsuits marked by abusive discovery practices. "According to the general counsel of an investment bank, 'discovery costs account for roughly 80% of the total litigation costs in securities fraud cases.'" H.R. Conf. Rep. No. 104-369, p 37 (1995). This, combined with the amount of time key employees are forced to spend to respond to discovery requests, *id.*, led to a new statutory requirement that the courts stay all discovery pending a ruling on a motion to dismiss, except in the exceptional case where particularized discovery was necessary to preserve evidence or to prevent undue prejudice to a party. 15 U.S.C. §77z-1(b), 78u-4(b)(3)(B).

Another key provision of the Reform Act addressed the award of attorney fees to prevailing parties in abusive litigation. Two competing interests were at play here: one, the need to reduce the filing of

meritless securities lawsuits, and two, the ability of victims of fraud to pursue legitimate claims. To balance these concerns, the Reform Act strengthened the sanctions provisions of Fed. R. Civ. P. 11, which require an attorney to conduct a reasonable investigation of the factual and legal basis of his claim before filing. It did so by adding new provisions to the 1933 and 1934 Acts requiring courts to include specific findings in the record at the conclusion of the action regarding whether all parties and all attorneys have complied with each Rule 11(b) requirement. 15 U.S.C. §78u-4(c).

"Prior to the passage of the Reform Act, there was essentially no significant securities class action litigation brought in State court." H.R. Rep. No. 105-640, 10 (1998). But as noted at a July 1997 hearing of the Subcommittee on Securities, the Reform Act caused "a noticeable shift in class action litigation from federal to state courts." S. Rep. No. 105-182, 3 (1997). This shift was characterized by the U.S. Securities and Exchange Commission (SEC) as "'potentially the most significant development in securities litigation' since passage of the Reform Act," H.R. Rep. No. 105-640, 10 (1998), while former SEC Commissioner Joseph Grundfest and another Stanford Law School faculty member summarized the apparent reason for the shift:

> Two phenomena seem to explain the bulk of this shift. First, there appears to be a "substitution effect" whereby plaintiff's counsel file state court complaints when the underlying facts appear not to satisfy new, more stringent federal pleading requirements,

> or otherwise seek to avoid the substantive or procedural provisions of the Act. Second, plaintiffs appear to be resorting to increased parallel state and federal litigation in an effort to avoid federal discovery stays or to establish alternative state court venues for settlement of federal claims.

S. Rep. No. 105-182, 3 (1998), citing Joint prepared statement of Joseph A. Grundfest and Michael A. Perino, "Reform Act Hearing," July 24, 1997, p. 6.

To curtail the proliferation in state courts of securities class actions beyond the reach of the Reform Act's protections, Congress enacted further protective legislation: the Securities Litigation Uniform Standards Act.

C. The SLUSA Was Designed To Curb Plaintiffs' Efforts To Circumvent The Protections Of The Reform Act By Making Federal Court The Exclusive Venue For Most Securities Class Action Lawsuits.

The Securities Litigation Uniform Standards Act (SLUSA) was enacted in 1998 to broadly encourage federal court jurisdiction by making federal court "the exclusive venue for most securities class action lawsuits." H.R. Rep. No. 105-640, pp. 8-9 (1998). Congress designed SLUSA's jurisdictional provisions to "prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than in Federal, court." *Id.*, p. 9.

To that end, the SLUSA bars state court jurisdiction over covered class actions that, like this one, only alleged violations of the Securities Act of

1933. 15 U.S.C. §77v. It does so through an exception in the jurisdictional provision of Section 22(a), which exempts "covered class actions" raising 1933 Act claims from concurrent jurisdiction. A covered class action is statutorily defined as a damages action brought on behalf of more than 50 persons. 15 U.S.C. §77p(f). Not only does the SLUSA preclude covered class actions alleging state-law securities claims, see 15 U.S.C. §77p(b), it also permits such precluded class actions to be removed to and dismissed in federal court. 15 U.S.C. §77p(b)-(c).

As one district court aptly explained, under Section 22(a) state courts are no longer courts of competent jurisdiction to hear covered 1933 Act class actions:

> By excluding these covered class actions from concurrent state and federal jurisdiction, federal courts alone have jurisdiction to hear them. After SLUSA, state courts were no longer "court[s] of competent jurisdiction" to hear covered class actions raising 1933 Act claims. Thus, the anti-removal provision does not apply to these covered class actions asserting exclusively federal claims.

Knox v. Agria Corp., 613 F. Supp. 2d 419, 425 (S.D.N.Y. 2009). This interpretation, *Knox* reasoned, "harmonizes with the rest of the SLUSA[,]" including the legislative intent to "prevent certain State private securities class action lawsuits alleging securities fraud from being used to frustrate the objectives of the" Reform Act. *Id.* at 425.

The SLUSA did not foreclose securities lawsuits from proceeding in state court altogether, but rather

preserved a very specific set of state-law actions. These include "(1) actions that are based upon the law of the State in which the issuer of the security in question is incorporated; (2) actions brought by States and political subdivisions, and State pension plans, so long as the plaintiffs are named and have authorized participation in the action; and (3) actions by a party to a contractual agreement (such as an indenture trustee) seeking to enforce provisions of the indenture." H.R. Rep. No. 105-640, p. 9 (1998).

II. Allowing Plaintiffs To Litigate Covered Class Actions Alleging Only 1933 Act Claims In State Courts, Despite The Plain Command Of The SLUSA That Such Class Actions Be Adjudicated In A Federal Forum, Creates A Host Of Problems For Defendants.

The decision below incorrectly concludes that the SLUSA continued state-court jurisdiction over class actions under the 1933 Act. The sole state appellate decision on this issue, *Luther v. Countrywide Fin. Corp.*, 195 Cal. App. 4th 789 (2011), announced that "concurrent jurisdiction of this case survived the amendments to the 1933 Act" and that, contrary to the SLUSA's clear statutory language and the legislative intent, state courts retain concurrent jurisdiction over class actions alleging only 1933 Act claims. *Id.* at 797. The decision in this case follows the reasoning of *Luther* and permits Respondents to proceed with their 1933 Act claim in California's trial court.

When plaintiffs are permitted to proceed with class actions alleging 1933 Act claims in state courts, the systemic abuses that prompted Congress to pass

the Reform Act in the first place are put back into play. DRI's members who regularly defend individuals and corporations are forced to litigate in a state forum devoid of the specific protections of the Reform Act. And plaintiffs are oftentimes particularly strategic about the specific state court they choose to file in, searching for "hellhole" or "magic" jurisdictions "where judges systematically apply laws and court procedures in an unfair and unbalanced manner, generally against defendants in civil lawsuits[.]" See generally, American Tort Reform Association, *Judicial Hellholes 2006*, http://www.atra.org/reports/ hellholes/. Such jurisdictions lack the qualities associated with the rule of law. Litigants do not know the rules in advance. The process is fundamentally unfair – and even nonsensical. Verdicts are rendered based on logic that is incomprehensible.

The well-known plaintiff's attorney, Dickie Scruggs, conceded that some jurisdictions are controlled by the plaintiff's bar. *Asbestos for Lunch*, Panel Discussion at the Prudential Securities Financial Research and Regulatory Conference (May 9, 2002), *in* INDUSTRY COMMENTARY (Prudential Securities, Inc., N.Y., New York) June 11, 2002, at 5. In a jurisdiction like that, cases will not be decided on the basis of the law:

> What I call the "magic jurisdiction," [is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected; they're State Court judges; they're popul[ists]. They've got large populations of voters who

> are in on the deal, they're getting their [piece] in many cases. And so, it's a political force in their jurisdiction, and it's almost impossible to get a fair trial if you're a defendant in some of these places. The plaintiff lawyer walks in there and writes a number on the blackboard, and the first juror meets the last one coming out the door with that amount of money.... These cases are not won in the courtroom. They're won on the back roads long before the case goes to trial. Any lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence of law is.

Id. As this statement suggests, a "magic jurisdiction" may result from venality and corruption. It may also reflect a populist philosophy – the notion that the purpose of civil litigation is the re-distribution of wealth and that juries, in dispensing "distributive justice", should not be hamstrung by legal rules and technicalities. A dissenting state supreme court justice, joined by two other justices, expressed this understanding of one verdict as a jury's effort to take money from a deep-pocket, out-of-state defendant:

> In its haste to place its imprimatur on this outrageous verdict by a Clay County "runaway" jury and, presumably, to redistribute the wealth of an out-of-state corporation with requisite deep pockets to stimulate the economy of eastern Kentucky, the majority opinion ignores the facts of this case, our own long-standing precedents, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United

States Constitution as interpreted by the United States Supreme Court.

Sand Hill Energy, Inc. v. Ford Motor Co., 83 S.W.3d 483, 501 (Ky. 2002) (Cooper, J., dissenting), *vacated and remanded* 538 U.S. 408 (2003), *rev'd on remand*, 142 S.W. 2d 153 (Ky. 2004).

Congress designed the SLUSA to provide defendants with an impartial federal forum and to curtail the phenomenon of "magnet" state court jurisdictions, which often certify classes with little to no scrutiny and otherwise prove hostile to out-of-state defendants. The decision below, which DRI anticipates other opportunistic plaintiffs will cite if it is not reversed by this Court, has effectively denied defendants access to the federal courts and resulted in a resurgence of the class-action-friendly state-court magnet jurisdictions whose influence Congress sought to diminish. When defendants are sued in such jurisdictions, defense attorneys are unable to base strategic decisions on the predictability of applying uniform legal standards, given the vagaries of geography and local animus. This leads to another related abuse: forced settlement of even meritless claims.

Exposure in securities fraud class actions is enormous; according to one study noted in conjunction with debate over the Reform Act, the average securities fraud claim was $40 million, with 10% of the cases seeking more than $100 million in damages. S. Rep. No. 104-98, 21. DRI knows all too well the ramifications to defendants nationwide should they be forced to litigate class actions, which would otherwise be confined to federal court, in a

state court. Even in the usual course, "the vast majority of certified class actions settle, most soon after certification." Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1291-1292 (2002) ("[E]mpirical studies...confirm what most class action lawyers know to be true[.]"); see also Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y. U. L. REV. 97, 99 (2009) ("With vanishingly rare exception, class certification [leads to] settlement, not full-fledged testing of the plaintiffs' case by trial."); Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 647 (2006) ("[A]lmost all certified class actions settle.").

Defendants, unwilling to roll the dice in state court, are placed under intense pressure to settle, even if an adverse judgment seems "improbable." *See Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742, 745 (7th Cir. 2008); *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995); *see also* Barry F. McNiel, et al., *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 489-90 (updated 8/5/96). This is particularly true where out-of-state defendants are forced to litigate a securities class action in state courts that are clearly aligned against defendants.

If affirmed by this Court, the opinion below will also encourage another abuse: using a state court case, filed parallel to a federal court case, in an attempt to gain discovery in the state court case for use in the federal court case where the Reform Act's

discovery stay would apply. Then-U.S. SEC Chairman Arthur Levitt testified about this precise abuse in his report to the President and Congress in the months following passage of the Reform Act. *See* Testimony of Arthur Levitt, Chairman, U.S. Securities and Exchange Commission Concerning The Impact Of The Private Securities Litigation Reform Act of 1995 Before The Subcommittee on Securities, Committee on Banking, Housing, and Urban Affairs, July 24, 1997, 1997 WL 418051, at *3. Opportunistic plaintiffs should not be permitted to sidestep the provisions of the Reform Act by bringing their lawsuits in state courts, where the SLUSA, by its plain terms, eliminated state court jurisdiction over such claims. But that is exactly what is occurring, and what will continue to occur, absent a reversal of the decision below.

The decision below harms DRI's individual and corporate clients in yet another, but equally concerning, way. Abusive state-court litigation hinders publicly-held companies from attracting and maintaining qualified board members for fear of being sued, regardless of how well they actually perform. S. Rep. 104-98, p 21. This has a direct negative impact on the performance of a company, and, in turn, can subject the company to further securities lawsuits.

The loophole created in *Luther* and other cases – including this one – denies defendants the impartial federal forum that the SLUSA's jurisdictional provisions were intended to ensure. The strain this places on the individuals and businesses that DRI's members are regularly called on to defend cannot be

overstated. The costs of a major lawsuit can sound the death knell for new companies and those suffering under today's current economic climate. Bradley J. Bondi, *Facilitating Economic Recovery and Sustainable Growth Through Reform of the Securities Class-Action System: Exploring Arbitration as an Alternative to Litigation*, 33 Harv. J.L. & Pub. Pol'y 607, 612 (Spring 2010). Allowing a covered class action to be brought and litigated in state court gives even more power in upfront settlement discussions to plaintiffs. "Such leverage can essentially force corporate defendants to pay ransom..." S. Rep. 109-15, 17, 20-21 (2005),; Michael B. Barnett, *The Plaintiffs' Bar Cannot Enforce the Laws: Individual Reliance Issues Prevent Consumer Protection Classes in the Eighth Circuit*, 75 Mo. L. Rev. 207, 208 (Winter 2010). This is completely at odds with the very purpose of the Reform Act and the SLUSA. Adopting the position advocated by Respondents will only exacerbate these problems and proliferate more of these "blackmail settlements." *Rhone*, *supra* at 1298, citing Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973).

This Court should reverse the decision below to adhere to the plain language of the SLUSA requirements that covered class actions alleging only 1933 Act claims must be adjudicated in federal court. Congress intended to – and did – confer a statutory right on defendants to present their defenses to such claims in a federal forum. Plaintiffs and their lawyers should not be permitted to circumvent the protections that the SLUSA provided to defendants. But if this Court adopts Respondents' argument, this is exactly what will occur. In turn, this will allow

abusive class actions to progress more easily at the state court level to certification – and legally unwarranted settlement. And the enhanced promise of a pay-off would trigger the filing of many more strike suits brought by opportunistic plaintiffs' attorneys to obtain "the defendants' cost savings from avoiding the litigation, distraction, and reputation costs of responding to the plaintiffs' complaint" rather than the true worth of the claim. James Bohn & Stephen Choi, *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions*, 144 U. Pa. L. Rev. 903, 970 (1996).

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Court of Appeal of the State of California, First Appellate District.

Respectfully submitted,

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August 31, 2017

CORR
AND
RET'D
OCT 20 2017

No. 15-1439

IN THE

Supreme Court of the United States

CYAN, INC., *et al.*,

Petitioners,

—v.—

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,
FIRST APPELLATE DISTRICT

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INTEREST OF *AMICI*

Amici are legal scholars who teach and write in the areas of federal jurisdiction and securities law.[1] Some *amici* teach in the field of federal jurisdiction, in which the presumption of concurrent state court jurisdiction over federal claims embodied in cases like *Tafflin v. Levitt*, 493 U.S. 455 (1990), is a crucial organizing principle. Others teach in the field of corporate and securities law, in which the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), Pub. L. No. 104-67, 109 Stat. 737, and the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105-353, 112 Stat. 3227, play a prominent role.

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[1] Pursuant to Rule 37.3, counsel for *amici curiae* affirm that this brief has been filed with the written consent of the parties, which filed blanket consents with the Court. Pursuant to Rule 37.6, counsel for *amici curiae* affirm that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici curiae* or their counsel, make a monetary contribution to fund the preparation or submission of this brief.

of Law, where he teaches and writes about federal jurisdiction, civil procedure, and complex litigation.

Ernest A. Young is the Alston & Bird Professor at Duke Law School, where he teaches and writes about federal jurisdiction and constitutional law.

Amici submit this brief in an effort to bring their scholarly expertise to bear in a manner that will assist the Court. In so doing, *amici* act in their capacity as individual scholars, and not on behalf of their respective institutions.

SUMMARY OF ARGUMENT

Any doubt as to whether SLUSA preserved concurrent state court jurisdiction over federal securities claims under the Securities Act of 1933 should be resolved in accord with this Court's longstanding presumption in favor of concurrent state court jurisdiction. *See, e.g.*, *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). That presumption reflects the basic structure of our judicial system, which decouples the law upon which a claim is based from the court that may hear that claim. As the Supremacy Clause makes clear, federal law is part of the binding law in every state, and the state courts generally have both the power and the obligation to hear claims based on that law in the absence of an affirmative act of Congress preempting their jurisdiction.

This longstanding presumption of concurrent jurisdiction is quite strong, and it can be overcome only "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981).

Certainly SLUSA contains no such "explicit statutory directive"; its text excepts from concurrent jurisdiction only mixed complaints involving both state and federal claims. Petitioners instead rely on expectations voiced in the legislative history that SLUSA would centralize securities litigation in the federal courts, as well as Congress's general purpose to limit state court litigation of securities claims. But these are exactly the sorts of arguments that this Court has rejected before in cases like *Tafflin* and *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820 (1990), as insufficient to overcome the presumption of concurrent jurisdiction.

The truth is that SLUSA, like most important federal statutes, reflects complex compromises and tradeoffs between a number of policies and values. Congress plainly allowed several significant classes of securities cases to remain in state court, reflecting that its general expectations and policies were qualified in certain circumstances. The best guide to those qualifications is the text Congress enacted, read against the background principle that concurrent state court jurisdiction endures unless explicitly withdrawn.

ARGUMENT

I. JURISDICTIONAL PROVISIONS OF SLUSA MUST BE EVALUATED IN LIGHT OF THE STRONG PRESUMPTION IN FAVOR OF CONCURRENT STATE COURT JURISDICTION OVER FEDERAL CLAIMS.

In *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990), this Court recognized "that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the

United States." This competence stems from the States' possession of "sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Id.* This "deeply rooted presumption in favor of concurrent state court jurisdiction," *id.* at 459, is rebuttable only by clear evidence of Congress's intent to make federal jurisdiction exclusive, *see id.* at 459-60. As Part II demonstrates, no such showing can be made here. We begin, however, by exploring the nature of *Tafflin*'s presumption and its connection to the foundational postulates of our federal system.

Tafflin reflects a fundamental but perhaps counter-intuitive principle of our judicial federalism: Our legal system generally decouples the nature of the court that hears a case from the nature of the law governing that case. As the conferral of federal diversity jurisdiction makes clear, there is no presumption that only state courts must hear claims involving state laws. *See* U.S. Const. art. III, § 2, cl. 1; 28 U.S.C. § 1332. And as the longstanding *Tafflin* line of cases reflects, there is also no presumption that federal claims belong in federal court. *See Claflin v. Houseman*, 93 U.S. (3 Otto) 130, 136-37 (1876).[2] Petitioners are thus wrong to urge that, simply because the Securities Act of 1933 ("1933 Act") is a federal statute, claims arising under that statute should be adjudicated in federal court. This argument flies in the face of both two centuries of jurisdictional history and the clear implications of the Supremacy

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[2] *See also* Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 420-21 (7th ed. 2015); Michael E. Solimine, *Rethinking Exclusive Federal Jurisdiction*, 52 U. Pitt. L. Rev. 383, 386-92 (1991).

Clause. The actual rule established by those sources, and recognized in this Court's precedents, is that state courts' concurrent jurisdiction can be preempted only by the clear and explicit intent of Congress.

A. THE HISTORICAL DEVELOPMENT OF FEDERAL JURISDICTION CONFIRMS THE BASELINE AUTHORITY AND OBLIGATION OF STATE COURTS TO HEAR FEDERAL CLAIMS.

The architects of our judicial system did not simply permit state courts to hear federal claims—they positively counted on the state courts to do so. Article III vested "[t]he judicial power of the United States" in the Supreme Court "and in such inferior courts as the Congress may from time to time ordain and establish," U.S. Const. art. III, § 1, leaving, in effect, to Congress the decision whether and to what extent to create lower federal courts. This "Madisonian Compromise" presupposed that if Congress did *not* create lower federal courts, the state courts would stand open to hear federal claims. *See Hart and Wechsler*, *supra*, at 7-9, 296. The Compromise presupposed, in other words, that those state courts would be an adequate and appropriate forum for vindicating rights under federal law. Finally, "concurrent jurisdiction . . . flows from the obligations imposed upon states by the supremacy clause," Solimine, *supra*, at 404, which this Court has interpreted to require even unwilling state courts to hear federal claims, *see Testa v. Katt*, 330 U.S. 386, 389-90 (1947).

Although the First Congress did choose to create lower federal courts, it nonetheless relied on state courts as not simply an alternative but the *primary* forum for claims under federal law. "In the sphere of private civil litigation," the First Judiciary Act "made

no use of the grant of judicial power over cases arising under the Constitution or laws of the United States." *Hart and Wechsler*, *supra*, at 22. That Act did, however, implement diversity jurisdiction for cases involving parties from different states. *See id.* at 23. (Indeed, had the 1933 Act claims that trouble Petitioners been part of the U.S. Code in 1789, this Court would have lacked even *appellate* jurisdiction over successful plaintiffs' claims, as the Court's jurisdiction in federal question cases was limited to cases in which the state courts had *rejected* a federal claim. *See id.* at 25.) The First Judiciary Act, in other words, decoupled the nature of the case from the nature of the forum by providing for federal jurisdiction over a wide range of cases involving state (and other) laws while withholding jurisdiction over most federal claims in private civil cases.

This situation largely persisted until 1875. Although the outgoing Federalist party enacted a broad provision for federal question jurisdiction in 1801, following their electoral defeat in 1800, the incoming Jeffersonian Republicans promptly repealed that provision in 1802. *See Hart and Wechsler*, *supra*, at 26-27. For most of the Nineteenth Century, then, state courts were not simply available to hear federal claims; they were the only game in town. General federal question jurisdiction did not return until the Reconstruction Congress included it in the 1875 Judiciary Act; that Act thus critically provided a federal forum to enforce Reconstruction's expansion of federal substantive rights (in the Thirteenth, Fourteenth, and Fifteenth Amendments) and federal remedies (especially in 42 U.S.C. § 1983). One need not downplay the importance of the right to a federal forum when a plaintiff wishes to pursue a federal claim there to insist on the continuing importance of

concurrent jurisdiction in state court. To this day, for example, state courts hear a large number of § 1983 claims, *see* Solimine, *supra*, at 413-19,[3] and this Court has considered it of great importance to ensure that they do so, *see, e.g.*, *Haywood v. Drown*, 556 U.S. 729, 731 (2009); *Howlett v. Rose*, 496 U.S. 356, 375-81 (1990).

The critical point is simply that "[c]oncurrent jurisdiction [over federal claims] has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule." *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-08 (1962). Article III and the Madisonian Compromise presupposed this concurrency, and the actual implementation of the judicial power by Congress has vindicated that expectation. Significantly, the 1933 Act fell squarely into this tradition of concurrent jurisdiction.

B. THE AUTHORITY OF STATE COURTS TO HEAR FEDERAL CLAIMS DERIVES FROM THE STATES' FUNDAMENTAL ROLE IN THE FEDERAL SYSTEM.

It is important to establish *why* state courts presumptively may hear federal claims in order to understand the sort of act required to displace that presumption. State courts can hear federal claims because they are part of the same legal system. As this Court said in *Claflin*, 93 U.S. at 136-37, "[t]he laws of the United States are laws in the several States, and

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[3] *See also* 1 Steven H. Steinglass, *Section 1983 Litigation in State Courts* § 1.1 (2008) ("State courts . . . emerged in the latter decades of the twentieth century as the forum of choice for an increasing number of plaintiffs . . . under 42 U.S.C.A. § 1983.").

just as much binding on the citizens and courts thereof as the State laws are. . . . The two together form one system of jurisprudence, which constitute the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other[.]" More than a century later, this Court elaborated:

> Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum—although both might well be true—but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure.

Howlett, 496 U.S. at 367. Alexander Hamilton said as much in Federalist 82, observing that "[w]hen . . . we consider the State governments and the national governments . . . in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited." The Federalist No. 82, at 555 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

This is why, for example, state courts are not free to *decline* to hear federal statutory causes of action. *See, e.g.*, *Testa*, 330 U.S. at 389-90 (observing that the Supremacy Clause obligates the state courts to treat federal law as their own law). And it follows, as Justice Scalia explained in *Tafflin*, that it "takes an

affirmative act of power [by Congress] under the Supremacy Clause to oust the States of jurisdiction—an exercise of . . . 'the power of congress to *withdraw*' federal claims from state-court jurisdiction." *Tafflin*, 493 U.S. at 470 (Scalia, J., concurring) (quoting *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 26 (1820)) (emphasis added in *Tafflin*). Hearing federal claims in state court is no more unusual, and no more dependent on some preexisting authorization from Congress, than any other activity in which state governments may engage. Withdrawal of federal claims from state court is thus an act of federal *preemption*, displacing an otherwise legitimate state governmental action by a clear exercise of congressional power. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."). As we elaborate further below, *Tafflin*'s requirement of clear evidence that Congress intended to displace concurrent state court jurisdiction over federal claims is simply a particularly forceful embodiment of *Rice*'s presumption against preemption.

II. *TAFFLIN V. LEVITT*'S PRESUMPTION OF CONCURRENT STATE COURT JURISDICTION OVER FEDERAL CLAIMS CONTROLS THIS CASE.

Tafflin stated that "the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." 493 U.S. at 459-60 (quoting *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981)). Although a strong argument can be made for discounting the second and third *Gulf Offshore*

factors, *see* Solimine, *supra*, at 401-13, this case can easily be resolved in favor of concurrent jurisdiction by applying the *Gulf Offshore* test as it stands.

A. SLUSA CONTAINS "NO EXPLICIT STATUTORY DIRECTIVE" WITHDRAWING STATE COURT JURISDICTION OVER 1933 ACT CLAIMS.

As Respondents' Brief explains, the most straightforward reading of SLUSA would not withdraw the state courts' longstanding concurrent jurisdiction over federal claims under the 1933 Act. *See* Resp. Br. 11-14. That Act, since its enactment, has provided for concurrent jurisdiction in a particularly emphatic form. Not only did Section 22 of the Act provide for federal court jurisdiction "concurrent with State and Territorial courts of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter," Act of May 27, 1933, ch. 38, tit. I, § 22, 48 Stat. 86, codified at 15 U.S.C. § 77v, but it also prohibited removal of such cases from state to federal court, *id.* In SLUSA, Congress amended § 77v by qualifying both provisions: It made state jurisdiction concurrent "except as provided in section 77p of this title with respect to covered class actions," Pub. L. No. 105-353, tit. I, § 101(a)(3), 112 Stat. 3230 (1998), and it prohibited removal "[e]xcept as provided in section 77p(c) of this title," *id.*

As amended in § 101(a)(1) of SLUSA, 112 Stat. 3227, Section 77p restricts only class actions "based upon the statutory or common law of any State or subdivision thereof," 15 U.S.C. § 77p(b). Hence, the only "exceptions" that § 77p "provided" were those concerning class actions based on state law. As a result, SLUSA carved out a particular set of class

actions—*mixed* complaints including both state and federal 1933 Act claims—that otherwise would have fallen within § 77v's provision for concurrent jurisdiction. But it said nothing about class actions raising only 1933 Act claims, because § 77p does not deal with such claims at all. Similarly, SLUSA amended § 77v's prohibition on removal only insofar "as provided in section 77p(c)," which likewise explicitly confines its effect to class actions based on state law by referencing subsection 77p(b).

To the extent that any of this is ambiguous, *Tafflin*'s presumption removes any doubt. Petitioners' argument is that § 77v should be read, as amended, to except all "covered class actions" as defined in § 77p(f)(2), regardless of whether they involve state or federal law claims. But § 77v does not point to § 77p(f)(2) or incorporate simply that subsection's definition of covered class actions; rather, § 77v incorporates the substance of § 77p more generally. That substance is simply to restrict covered class actions when they rely on state law. Certainly, there is no "explicit statutory directive" in either § 77v or § 77p restricting the state courts' longstanding concurrent jurisdiction over 1933 Act claims.[4]

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[4] Given the longstanding nature of that jurisdiction, Petitioners' argument also runs up against the presumption against repeals by implication. *See, e.g.*, *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662-63 (2007) ("'[R]epeals by implication are not favored' and will not be presumed unless the 'intention of the legislature to repeal [is] clear and manifest.'") (quoting *Watt v. Alaska*, 451 U.S. 259, 267 (1981)). That is particularly true when statutes affecting the allocation of jurisdiction between state and federal courts are concerned. *See, e.g.*, *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 630 (1874).

Petitioners seem to think that *Tafflin*'s presumption is rebutted by the fact that SLUSA did incorporate *some* restriction on state courts' jurisdiction. *See* Pet. Br. 38. But the fact that Congress plainly wanted to extend its prohibition of state-law class actions brought in state court to those pleaded along with 1933 Act claims (and to avoid any conflict between the anti-removal provision in § 77v and the provision for removal in § 77p(c), *see* Resp. Br. 12-13), says nothing about whether Congress wanted to eliminate concurrent jurisdiction over 1933 Act claims themselves. SLUSA simply does not say what to do with those claims when they are brought in state court. Petitioners' argument, in essence, is that this Court should fill this lacuna in light of some general imputed purpose to get securities litigation out of state court. But that sort of inference is precisely what *Tafflin*'s insistence on an "explicit statutory directive" forbids.

In any event, this Court has made clear that *Tafflin*'s presumption is not limited to the question whether Congress seeks to withdraw *any* of the state courts' jurisdiction over federal claims. Rather, the presumption also extends to any ambiguities concerning the *scope* of any such withdrawal that Congress might choose to make. Just two terms ago, this Court rejected the proposition that "this Court's concern for state court prerogatives disappear[s] . . . in the face of a statute granting exclusive federal jurisdiction. . . . To the contrary, when a statute mandates, rather than permits, federal jurisdiction—thus depriving state courts of all ability to adjudicate certain claims—our reluctance to endorse broad reading[s], if anything, grows stronger." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning*, 136 S. Ct. 1562, 1573 (2016) (internal quotation omitted). Significantly, *Claflin*, 93 U.S. (3 Otto) 130—generally

considered the seminal case for the presumption of concurrent jurisdiction—involved just such a situation. In that case, the defendant argued for exclusive federal jurisdiction over suits by assignees in bankruptcy precisely because Congress had clearly conferred exclusive jurisdiction over bankruptcy cases upon the federal courts. *See id.* at 132. But the Court nonetheless applied a strong presumption of concurrent jurisdiction in concluding that this exclusivity did not extend to suits by bankruptcy assignees. *See id.* at 136.

The same point is evident in this Court's preemption jurisprudence. Because the states have independent authority to hear federal claims, based on their status as coordinate sovereigns bound by federal law, SLUSA raises a question of preemption: Did Congress intend to preempt the states' ability to hear 1933 Act claims?[5] A general presumption against preemption governs such questions, especially in areas—like concurrent jurisdiction under the 1933 Act—of longstanding state activity. *See Rice*, 331 U.S. at 230. And while there has been debate on the question, this Court's most recent decisions generally hold that even where Congress includes an explicit statutory preemption clause, the presumption against preemption governs ambiguities regarding that clause's scope. *See, e.g.*, *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2188-89 (2014) (plurality opinion); *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008); *Bates v. Dow Agrosciences LLC*, 544

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[5] This Court has explicitly rejected arguments that state courts' concurrent jurisdiction over federal claims is grounded in some sort of implicit grant of authority from Congress. *See Howlett*, 496 U.S. at 370 n.17 (rejecting claim that "the obligation of state courts to enforce federal law rests, not on the Supremacy Clause, but on a presumption about congressional intent").

U.S. 431, 449 (2005).[6] Similarly, in choosing between "plausible alternative reading[s]" of § 77v in the present case, this Court has "a duty to accept the reading that disfavors pre-emption." *Bates*, 544 U.S. at 449.

B. SLUSA'S LEGISLATIVE HISTORY CONTAINS NO "UNMISTAKABLE IMPLICATION" FORECLOSING STATE COURT JURISDICTION OVER 1933 ACT CLAIMS.

This Court has never found the *Tafflin* presumption to be rebutted based on legislative history alone. *See Tafflin*, 493 U.S. at 472 (Scalia, J., concurring).[7] Indeed, this Court has said more recently that "[s]o strong is the presumption of concurrency that it is defeated only in two narrowly defined circumstances: first, when Congress expressly ousts state courts of jurisdiction . . . and second, '[w]hen a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts.'" *Haywood*, 556 U.S. at 735 (citing *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 221 (1916), and *Claflin*, 93 U.S. at 136; and quoting *Howlett*, 496 U.S. at 372). There is no express ouster here, and this Court has never read *Tafflin*'s consideration of legislative history to permit litigants

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[6] *See also* Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 Sup. Ct. Rev. 253, 272-73 (2012).

[7] *See also id.* ("[O]ne can hardly imagine an 'implication from legislative history' that is 'unmistakable'—*i.e.*, that demonstrates agreement to a proposition by a majority of both Houses and the President—unless the proposition is embodied in statutory text to which those parties have given assent.").

seeking to avoid state court to make, so to speak, something out of nothing.[8]

Freestanding legislative history is not law, of course. Committee reports and statements by legislators are not voted on by both houses and presented to the President, *cf. INS v. Chadha*, 462 U.S. 919, 956-58 (1983) (insisting on these prerequisites for congressional action with the force of law). Much of Petitioners' legislative history evidence consists of views expressed by single legislators, but this Court has said that "the views of a single legislator, even a bill's sponsor, are not controlling." *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 385 (2012). And legislative history is notoriously susceptible of manipulation or mistake. For example, some of SLUSA's legislative history is demonstrably inconsistent with what the statutory text actually does. *See, e.g.*, Jennifer J. Johnson, *Securities Class Actions in State Court*, 80 U. Cin. L. Rev. 349, 375 (2012) (noting that the Conference Report says Congress intended that the "Delaware carve-out" would be limited to suits filed in state court in the defendant's state of incorporation, but that SLUSA's text lacks this limit and courts have unanimously concluded that it does not exist).

In any event, this Court has rejected the very sort of legislative history argument that Petitioners advance here. In *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820 (1990), proponents of

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[8] *See, e.g., Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1990) ("Title VII contains no language that expressly confines jurisdiction to federal courts or ousts state courts of their presumptive jurisdiction. The omission of any such provision is strong, and arguably sufficient, evidence that Congress had no such intent.").

exclusive federal jurisdiction over Title VII claims submitted extensive legislative history evidence from a broad range of actors expressing the expectation that Title VII enforcement would be centered in federal court. This Court flatly—and unanimously—rejected that evidence as insufficient. "[W]ithout disagreeing with petitioner's persuasive showing that most legislators, judges, and administrators who have been involved in the enactment, amendment, enforcement, and interpretation of Title VII expected that such litigation would be processed exclusively in federal courts," Justice Stevens wrote, "we conclude that such anticipation does not overcome the presumption of concurrent jurisdiction that lies at the core of our federal system." *Id.* at 826.

C. THERE IS NO "CLEAR INCOMPATIBILITY BETWEEN STATE COURT JURISDICTION" OVER 1933 ACT CLAIMS "AND FEDERAL INTERESTS."

The heart of Petitioners' argument—and that of their *amici*—is that making federal jurisdiction over 1933 Act claims exclusive would be the best way to further the broad policy goals of not only SLUSA but also the PSLRA. Such policy arguments have never been sufficient under *Tafflin*, and they should not be so here. Moreover, it seems likely that Petitioners and their *amici* have imputed their own policy preferences to Congress. SLUSA's text clearly reveals an intricate compromise between any number of potentially conflicting policy goals—not, as Petitioners insist, a single-minded demand for cutting state courts out of securities enforcement.

1. POLICY ARGUMENTS BASED ON BROAD FEDERAL INTERESTS SHOULD NEVER BE ENOUGH TO EXCLUDE STATE COURT JURISDICTION.

In the early days of this Court's concurrent jurisdiction jurisprudence, some decisions seem to have relied on implicit conflicts with federal policy as a basis for exclusive federal jurisdiction, even in the absence of an explicit statutory directive. *See* Solimine, *supra*, at 387-88. These cases tended not to discuss *Claflin*, which had articulated a strong presumption favoring concurrency, or to offer much in the way of explanation at all. *See, e.g.*, *Freeman v. Bee Mach. Co.*, 319 U.S. 448, 451 (1943) (concluding—with no discussion whatsoever—that state courts lack concurrent jurisdiction over antitrust cases). But at least since *Dowd Box*, 368 U.S. 502, much more than that has been required. *See* Solimine, *supra*, at 388-92. Hence, Justices Scalia and Kennedy were able to conclude in *Tafflin* that the notion that "this Court [may] exclude state-court jurisdiction when systemic federal interests make it undesirable . . . has absolutely no foundation in our precedent." 493 U.S. at 472 (Scalia, J., concurring).

Given that withdrawal of federal jurisdiction from the state courts requires a preemptive act by Congress, *Gulf Offshore*'s notion of "clear incompatibility" corresponds to the "purposes and objectives" branch of this Court's preemption jurisprudence. That branch suggests that preemption occurs whenever state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The pitfalls of this sort of analysis are well-known, however. As Justice Thomas has argued, "[t]his brand of the Court's pre-emption jurisprudence

facilitates freewheeling, extratextual, and broad evaluations of the 'purposes and objectives' embodied within federal law." *Wyeth v. Levine*, 555 U.S. 555, 604 (2009) (Thomas, J., concurring in the judgment); *see also Geier v. American Honda Motor Co.*, 529 U.S. 861, 907-08 (2000) (Stevens, J., dissenting) (describing the purposes and objectives doctrine as "potentially boundless (and perhaps inadequately considered)"). In particular, the "desire to divine the broader purposes of the statute before [the court] inevitably leads it to assume that Congress wanted to pursue those policies 'at all costs'—even when the text reflects a different balance." *Wyeth*, 555 U.S. at 601.

As we argue below, SLUSA reflects just such a balance among competing imperatives. To be sure, Congress sought in the PSLRA and SLUSA to make securities class actions more difficult to prosecute and to consolidate many of them in federal court. But Congress also incorporated many exceptions and qualifications to these objectives, and these textual nuances should not be lost by generalized appeals to broad policy imperatives. This is yet another case in which "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 171 (2007).

2. CONSTRUING SLUSA TO PRESERVE STATE COURT JURISDICTION OVER 1933 ACT CLAIMS WILL NOT UNDERMINE FEDERAL INTERESTS IN UNIFORMITY.

Petitioners and their *amici* impute to Congress an overwhelming purpose to secure uniformity—with

respect to both the substance of federal securities law and the procedures by which it is enforced. *See* Resp. Br. 11-12, 37; Brief of *Amici Curiae* Law Professors in Support of Petitioners ("Professors' Br.") 4. But uniformity arguments have not fared particularly well under *Tafflin*. It bears emphasis that in that case, the arguments for uniformity were quite strong. Proponents of exclusive jurisdiction over civil RICO claims urged that, because RICO incorporated federal crimes as predicate acts, concurrent jurisdiction over RICO claims would lead to the inconsistent application of federal criminal laws. Those proponents also argued that state court jurisdiction would undermine particular procedural mechanisms that Congress had built into the RICO statute, but which only operated in federal court. The Court nonetheless flatly—and unanimously—rejected these arguments.

The *Tafflin* Court's reasons for rejecting these arguments are instructive because they are equally applicable here. The Court emphasized that federal courts "would not be bound by state court interpretations of the federal offenses constituting RICO's predicate acts," and that "[s]tate courts adjudicating civil RICO claims will, in addition, be guided by federal court interpretations of the relevant federal criminal statutes, just as federal courts sitting in diversity are guided by state court interpretations of state laws." *Tafflin*, 493 U.S. at 465. Both of those things are true here, and neither Petitioners nor their *amici* have pointed to any systematic evidence that the state courts have substantively diverged from federal court interpretations of the 1933 Act.[9]

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[9] Although Petitioners' *amici* emphasize that state courts are not bound by decisions of lower federal courts, Professors' Br. 17,

Petitioners' *amici* do cite two instances in which similar circumstances led to different results in state and federal court. *See* Professors' Br. 21-24. The plural of "anecdote," however, is not "data": two data points tell us little, if anything, about whether such divergences are widespread. There is no indication that the state and federal courts in either instance interpreted the relevant federal legal standards differently, rather than simply reaching divergent applications of the law to a particular set of facts. One could no doubt find similar instances of divergence under similar circumstances between courts *within* the federal system. Moreover, it is unclear why the ordinary rules of *res judicata* and collateral estoppel, which traditionally check this sort of duplicative litigation of the same facts, were inadequate in these instances. Finally, as *Tafflin* emphasized, this Court retains jurisdiction to review and correct egregious instances of inconsistent administration of federal law by the state courts. *See* 493 U.S. at 465. To conclude that state courts are simply incapable of consistently applying federal legal standards would "not only denigrate the respect accorded coequal sovereigns, but would also ignore our 'consistent history of hospitable acceptance of concurrent jurisdiction.'" *Id.* at 466 (quoting *Dowd Box*, 368 U.S. at 508).

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they fail to acknowledge widespread deference to those decisions—even in California. *See, e.g., Etcheverry v. Tri-Ag Serv., Inc.*, 993 P.2d 366, 368 (Cal. 2000) ("While we are not bound by decisions of the lower federal courts, even on federal questions, they are persuasive and entitled to great weight. . . . [W]here the decisions of the lower federal courts on a federal question are both numerous and consistent, we should hesitate to reject their authority.") (internal quotations and citations omitted).

Tafflin also made short work of arguments for procedural uniformity. Noting that "RICO's procedural mechanisms include extended venue and service-of-process provisions that are applicable only in federal court," the Court nonetheless observed that "we have previously found concurrent state court jurisdiction even where federal law provided for special procedural mechanisms." 493 U.S. at 466 (citing *Dowd Box*, 368 U.S. at 508 (finding concurrent jurisdiction over Labor Management Relations Act § 301(a) suits, despite federal enforcement and venue provisions), and *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980) (finding concurrent jurisdiction over 42 U.S.C. § 1983 suits, despite federal procedural provisions in § 1988)).[10] Acknowledging that "congressional specification of procedural mechanisms applicable only in federal court may tend to suggest that Congress intended exclusive federal jurisdiction," the Court concluded that "it does not by itself suffice to create a 'clear incompatibility' with federal interests." *Id.* at 466-67.

In any event, SLUSA hardly evinces a preference for uniformity "at all costs"—either as a matter of substance or procedure. For example, § 77p(d)(1)—the famous "Delaware carve-out"—preserved not only state court jurisdiction but also state law claims where a suit is based on the law of the state in which the issuer is incorporated. This has turned out to be the largest category of post-SLUSA class actions in state court by a considerable margin. *See* Johnson, *supra*, at 373-74. Even more subversive of substantive

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[10] *See also Yellow Freight*, 494 U.S. at 825-26 (rejecting the availability of special procedures available in federal court litigation under Title VII as a reason for denying concurrent state court jurisdiction).

uniformity, SLUSA precludes suits based on state law only if they take the form of class actions—not if they involve a small number of litigants. 15 U.S.C. § 77p(d)(1)(A). This legislative choice is hardly consistent with a desire to keep state courts from construing and applying the 1933 Act. And it leaves open the possibility, for example, that large institutional investors may avoid the PSLRA's strictures by suing individually or in small groups in state court. *Cf. id.* § 77p(f)(2)(A).

SLUSA's commitment to procedural uniformity is likewise qualified by significant compromises. Petitioners do not deny, for instance, that large institutional investors could bring 1933 Act claims in state court and might well have incentives to do so. Likewise state governmental authorities are expressly authorized to bring suits in state court on behalf of themselves or state pension plans. *See id.* § 77p(d)(2). *Cf. generally* Paul Nolette, *Federalism on Trial: State Attorneys General and National Policymaking in Contemporary America* (2015) (noting the rise of litigation by state governments seeking to impose regulatory settlements on national industries). And if Congress had really sought uniformity above all other values, it would have committed securities litigation to public officials or centralized the cases in a single federal court rather than leaving it subject to the inevitable variation that even exclusive jurisdiction in federal courts permits. *See Tafflin*, 493 U.S. at 465 (suggesting that "state court adjudication of civil RICO actions . . . will not, in any event, result in any more inconsistency than that which a multimembered, multi-tiered federal judicial system already creates").

The bottom line is that SLUSA is a complex statute reflecting a variety of both substantive and

procedural compromises. Congress balanced not only uniformity and the need to protect vulnerable defendants, but also a desire to preserve traditional state primacy over the law of corporate governance, the enforcement prerogatives of state executive officials, the convenience of individual litigants, and the need to ensure vigorous enforcement of federal securities laws in appropriate cases. *Cf. id.* at 467 (noting that "far from disabling or frustrating federal interests, '[p]ermitting state courts to entertain federal causes of action facilitates the enforcement of federal rights'") (quoting *Gulf Offshore*, 453 U.S. at 478 n.4). The general purpose of Congress to enhance the uniformity of federal securities enforcement does not establish that it did not qualify that purpose by preserving the benefits of traditional concurrent state court jurisdiction in 1933 Act cases. Given that Congress legislated against the clear background of this Court's presumption of concurrent jurisdiction in *Tafflin* and similar cases, Congress's decision not to explicitly and clearly exclude state court jurisdiction over such cases should be interpreted as just such a qualification—not some sort of mistake.

3. PETITIONERS' *AMICI* DO NOT PRESENT COMPELLING EVIDENCE OF A DISPARITY BETWEEN STATE AND FEDERAL COURTS.

In addition to citing two instances in which federal and state courts have reached divergent results in similar circumstances, Petitioners' *amici* also purport to demonstrate that the state courts are systematically more receptive to class action lawsuits by securities plaintiffs. *See* Professors' Br. 19-25. This is an attack on the general notion of "parity" between state and federal courts, and it implicates one of the most difficult empirical questions in the law of federal

jurisdiction. *See generally Hart and Wechsler*, *supra*, at 299-300. It is, for example, impossible to demonstrate whether federal or state courts are more likely to apply federal law "correctly" without agreeing on what the right answer was, in fact, in each of the cases in the data set. *See id.* at 299 (suggesting that "[t]he answer to [this framing of the parity] question is bound up with normative issues . . . that are not subject to empirical measurement."). Other studies have asked—as Petitioners' *amici* do—whether particular kinds of federal claims are more likely to be successful in state or federal courts. But here it is critical to compare apples to apples; a higher success rate for federal plaintiffs in one forum or the other would be meaningless unless we know that the federal claims in each set were of largely equivalent merit and litigated with equivalent resources and skill. *See id.* at 300. It is not surprising that one leading review of the empirical literature on parity concluded that "[a]lthough parity is an empirical question, no empirical answer seems possible." Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. Rev. 233, 273 (1988).

Against this general background, it is critical to recognize that Petitioners' *amici* have not presented an actual *study* of securities litigation in state and federal court. Rather, they have selected a particular jurisdiction—California—and simply reported that dismissals are less common and settlements more frequent in that jurisdiction over a particular time period than in federal court. There is no indication whether California is typical of other states in this regard, and no attempt to explain *why* the disparate

pattern exists.[11] Nor is there any apparent effort to control for other variations in the sample that might prevent an apples-to-apples comparison of the claims in state and federal court.

Finally, it is worth noting that Petitioners' attack on state/federal court parity is profoundly counter-intuitive. Parity skeptics have generally asserted that, for a variety of reasons, state courts are likely to be unduly hostile to federal claims. *See, e.g.*, Burt Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1997). The claim that Petitioners make here—that state courts are unduly *sympathetic* to the assertion of plaintiffs' rights under the federal securities laws—surely requires a much more compelling demonstration than Petitioners or their *amici* have made so far. That is especially true given this Court's refusal to consider challenges to parity as a reason to deny concurrent state court jurisdiction even in settings where there are considerably more intuitive reasons to doubt that it exists. *See, e.g.*, *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980) (finding that state courts have concurrent jurisdiction over § 1983 cases).

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[11] Petitioners' *amici* do suggest that the plaintiffs' bar, perceiving that California is unusually sympathetic to securities claims, has taken to filing cases in California that have little connection to the state. Professors' Br. 20-21. If this were true, then perhaps it would not matter if states are not *generally* more sympathetic to securities claims, as cases would migrate to the most sympathetic state forum. But this Court's tightening of personal jurisdiction requirements ought to restrict this sort of forum shopping to a significant degree. *See, e.g., Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773 (2017).

CONCLUSION

The judgment of the Court of Appeal of the State of California, First Appellate District should be affirmed.

Respectfully submitted,

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CYAN, INC., *et al.*,
Petitioners,

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, *et. al.*,
Respondents.

On Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District

BRIEF FOR FORMER SEC COMMISSIONERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici curiae are former Commissioners of the United States Securities and Exchange Commission (the "SEC").[1] *Amici* have devoted substantial parts of their professional careers to drafting, implementing, and studying the federal securities laws, including how those laws should be interpreted to ensure the protection of investors and the promotion of efficiency, competition, and capital formation.

Amici urge the Court to reverse the decision of the Court of Appeal of the State of California, First Appellate District, by holding that the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") deprives state courts of subject-matter jurisdiction over "covered class actions" that allege only claims under the Securities Act of 1933 (the "Securities Act"). This result is required by the text, stated purposes, and legislative history of SLUSA. Moreover, confining class claims asserting Securities Act violations to the federal courts is essential to orderly capital formation, which is the primary purpose of the Securities Act. Orderly

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae* or their counsel, contributed any money to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, *amici curiae* also certify that Petitioners and Respondents have consented to the filing of *amicus* briefs in support of either party or of neither party and their consents have been filed with the Court.

capital formation requires certainty, predictability, and uniformity in the enforcement of the securities laws, and is therefore furthered by limiting class actions asserting Securities Act claims to federal courts, which have historically been the forum for economically significant cases arising under the Securities Act and whose trial and appellate courts have developed a considerable body of law that guides the capital formation process.

Amici are listed below in alphabetical order:

Charles Cox, a former Commissioner and Acting Chairman of the SEC, currently Executive Vice President of Compass Lexecon, Inc.

Daniel Martin Gallagher, a former Commissioner of the SEC.

Philip Lochner, a former Commissioner of the SEC, currently Director of CMS Energy Corporation and Crane Co.

Steven Wallman, a former Commissioner of the SEC, currently CEO of FOLIOfn, Inc.

SUMMARY OF ARGUMENT

Amici agree with Petitioners that state courts lack subject-matter jurisdiction over covered class actions alleging solely federal law claims under the Securities Act. Accordingly, this Court should reverse the contrary decision below by the Court of Appeal of the State of California, First Appellate District.

In the mid-1990s, Congress enacted two sweeping amendments to the primary laws governing private securities litigation: the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), Pub. L. 104-67, 109 Stat. 737, and SLUSA, Pub. L. 105-353, 112 Stat. 3227. The PSLRA, enacted in response to perceived abuses in securities litigation, instituted numerous reforms in such cases. But it had an "unintended consequence," *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 82 (2006): it prompted plaintiffs to bring securities class actions in state courts, which were virtual strangers to the securities laws, in order to evade many of the PSLRA's reforms. *Id.* Congress responded by enacting SLUSA to stem the "shift[] from Federal to State courts" and to require that significant securities class actions be litigated in federal court, where they would be subject to the strictures of the PSLRA. *See* SLUSA, Pub. L. 105-353, § 2(2), (5), 112 Stat. 3227, 3227; *Dabit*, 547 U.S. at 82.

SLUSA specifically altered the Securities Act's jurisdictional grant. The natural meaning of the words Congress chose—which aligns with the precepts of federalism, the statute's purposes, and the need for certainty in the capital formation process—strips state courts of jurisdiction over class actions that allege claims under the Securities Act, including where there are no pendent state law claims ("Exclusively Federal Covered Class Actions"). *See generally* Mitchell A. Lowenthal & Shiwon Choe, *State Courts Lack Jurisdiction To Hear Securities Act Class Actions, But the*

Frequent Failure To Ask the Right Question Too Often Produces the Wrong Answer, 17 U. Pa. J. Bus. L. 739 (2015).

BACKGROUND

As originally enacted following the Great Depression, Section 22(a) of the Securities Act allowed plaintiffs a near-absolute right to choose their preferred forum as between federal and state court, giving federal courts "jurisdiction . . . , concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter." 15 U.S.C. § 77v(a) (1987) (amended 1998) (the "Jurisdictional Provision"). Section 22(a) also contained a prohibition on the removal of Securities Act claims under the general removal provision for cases raising federal questions, when originally filed in a state court of "competent jurisdiction" (the "Removal Bar"). *Id.*

Despite concurrent jurisdiction, in the 60 years following the enactment of the Securities Act, "state-court class actions involving nationally traded securities were virtually unknown." S. Rep. No. 105-182, at 3-4 (1998). Rather, "the plaintiffs' bar had apparently concluded that the best place to litigate their cases was in the federal courts." SLUSA: Hearing Before the Subcomm. on Fin. and Hazardous Materials of the H. Comm. on Commerce, 105th Cong. 47 (1998) ("H. Subcomm. SLUSA Hearing") (statement of David L. Anderson, Pillsbury Madison & Sutro LLP). As a result, from

1933 until the enactment of the PSLRA, there were virtually no decisions addressing the standards for pleading, class certification, or the substantive requirements of the Securities Act issued by state trial or appellate courts. (And, except for decisions concerning whether state courts have jurisdiction to hear covered class actions asserting Securities Act claims, nearly none since then.)

The PSLRA, which was enacted in response to securities litigation abuses—particularly in suits brought as class actions, which Congress concluded would "injure the entire U.S. economy," *Dabit*, 547 U.S. at 81 (citation and internal quotation marks omitted)—instituted numerous reforms. Among them: limiting recoverable damages and attorneys' fees, providing a "safe harbor" for forward-looking statements, imposing new restrictions on the selection and compensation of lead plaintiffs, mandating the imposition of sanctions for frivolous litigation, and authorizing an automatic stay of discovery pending the resolution of any motion to dismiss. *See* 15 U.S.C. §§ 77z-1, 77z-2 (amendments to the Securities Act); 15 U.S.C. §§ 78u-4, 78u-5 (amendments to the Securities Exchange Act of 1934).

Because some of the PSLRA's reforms did not appear to apply to class actions brought in state court, its enactment had an "unintended consequence": a dramatic shift towards bringing securities class actions, including class actions asserting claims under the Securities Act, in state court. *See Dabit*, 547 U.S. at 81-82.

In 1997, the Chairman and Ranking Member of the Senate Subcommittee on Securities jointly introduced a bill designed to close this "loophole [that] was being exploited" and ensure that national securities class actions would have to be filed only in federal court and be subject to federal standards. *See* S. 1260, 105th Cong. (2d Sess. 1997). Following a year of hearings, congressional debate and revisions to the bill, Congress moved forward to stem the "shift[] from Federal to State courts" and "prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the [PSLRA]." SLUSA, Pub. L. No. 105-353, § 2(2), (5), 112 Stat. 3227, 3227.

The result, SLUSA, combatted the shift of significant Securities Act cases to state court in three ways. First, in Section 16(b), SLUSA precluded the assertion in class actions of certain state law claims that overlapped with private remedies available under the Securities Act (and the Securities Exchange Act of 1934). *See* 15 U.S.C. § 77p(b). Second, in Section 16(c), SLUSA allowed for the removal to federal court of certain "covered class actions" involving covered securities. *See* 15 U.S.C. § 77p(c). And third, SLUSA's amendment to the Jurisdictional Provision (the "Jurisdictional Amendment") eliminated the subject-matter jurisdiction of state courts to hear certain Securities Act class actions, revising Section 22(a) to read as follows:

> The district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, ***except as provided in section 77p of this title*** **[Section 16 of the Securities Act]** ***with respect to covered class actions,*** of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter.

15 U.S.C. § 77v(a) (language added by SLUSA's Jurisdictional Amendment emphasized).

ARGUMENT

The Jurisdictional Amendment in SLUSA unambiguously altered the Securities Act's Jurisdictional Provision. This case concerns what change Congress effected. By its plain terms, the amendment eliminated state court jurisdiction over *some* category of actions over which state courts previously had jurisdiction concurrent with federal courts. But the question of what category of actions state courts now lack jurisdiction over has led to a sharp disagreement in the lower courts and among the parties here.

In *amici*'s view, the proper interpretation of these provisions is that the Jurisdictional Amendment in SLUSA stripped state courts of

their prior concurrent jurisdiction to hear "covered class actions" asserting Securities Act claims. This meaning is felicitous to the actual words Congress chose—the reference to "covered class actions" being subject to exclusive federal jurisdiction is given content by the definition of that term in Section 16(f) of the Securities Act—and is consistent with the evil SLUSA was meant to address: the abrupt and dramatic migration of securities class actions filed in state court in order to evade the PSLRA. Moreover, this interpretation is essential to providing the certainty and uniformity necessary to the orderly capital formation process. Thus, SLUSA eliminated state court jurisdiction over covered class actions asserting Securities Act claims, making all such class actions subject to the PSLRA and to the full body of federal procedural law.

I. THE ONLY READING THAT GIVES MEANING TO THE JURISDICTIONAL AMENDMENT IS THAT STATE COURTS LACK JURISDICTION OVER SECURITIES ACT CLASS ACTIONS

SLUSA's Jurisdictional Amendment—the "except" clause added to Section 22(a) of the Securities Act—unambiguously deprives state courts of jurisdiction over *some* category of "covered class actions" under the Securities Act. The Jurisdictional Amendment identifies that category of "covered class actions" by referencing Section 16 of the Securities Act ("as provided in [Section 16]"), which, in Section 16(f), defines that term, one

unique to SLUSA. There is no other plausible alternative that does not disregard what Congress did. The two candidates that have been offered by the lower courts cannot overcome reasoned analysis.

A. Section 16(f) of the Securities Act Defines the Category of Securities Act Cases Excluded By the Jurisdictional Amendment

"Covered class action" is a term of art unique to, and defined by, SLUSA. 15 U.S.C. § 77p(f)(2). (A "covered class action" differs in numerous respects from Rule 23 class actions, including by requiring 50 class members and by permitting the aggregation of class members in multiple, separate, lawsuits. *See* Lowenthal, 17 U. Pa. J. Bus. L. at 755). Thus, the reference to Section 16 in the Jurisdictional Amendment is necessary to give the term "covered class action" meaning, because neither SLUSA's Jurisdictional Amendment nor the Securities Act's Jurisdictional Provision as a whole defines that term. *See, e.g., Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 783-84 (2000) (definition in one section of statute that "contains a provision expressly defining [term] 'for purposes of this section'" suggests that definition does not apply to other sections of statute) (internal brackets omitted).

There would be no debate had Congress cross-referenced solely the definitional subsection of Section 16 rather than Section 16 generally. But there is a ready explanation for that general

reference: when the bill that was to become SLUSA was first introduced, there was no proposed Section 16(f) for the Jurisdictional Amendment to reference. *See* Lowenthal, 17 U. Pa. J. Bus. L. at 769. Statutory definitions are typically placed at the beginning or end of the statutory section in which they appear;[2] in Section 16, they were placed at the end. *Id.* As a result, as the bill was being drafted and revised, the subsection letter designation of the definitional provision kept changing, as amendments were added or deleted, affecting what the last subsection letter would be. *See* S. 1260, 105th Cong. § 2(a)(1)(d) (as introduced in Senate, Oct. 7, 1997); *id.* § 3(a)(1)(f) (as reported in Senate, May 4, 1998); *id.* § 3(a)(1)(g) (as passed by Senate, May 13, 1998); *id.* § 101(a)(1)(f) (as passed by House, July 22, 1998). The Jurisdictional Amendment's reference to Section 16 as a whole, and not Section 16(f) specifically, is thus a result of the drafting process, not anything else. *See* Lowenthal, 17 U. Pa. J. Bus. L. at 769.

B. No Provision in Section 16 of the Securities Act Other Than Section 16(f) Can Give the Jurisdictional Amendment Meaning

Some courts have concluded that the cross-reference in SLUSA's Jurisdictional Amendment to

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[2] *See* Donald Hirsch, *Drafting Federal Law* 24 (2d ed. 1989) (explaining the ideal ordering of various aspects of legislation); U.S. House of Representatives Office of the Legislative Counsel, *House Legislative Counsel's Manual on Drafting Style* 23, 29 (1995); U.S. Senate Office of the Legislative Counsel, *Legislative Drafting Manual* 9 (1997).

Section 16 does not simply refer to the definition of "covered class action" in Section 16(f), but instead refers to some other portion of Section 16, thereby placing an ***additional*** substantive limitation on the scope of the Jurisdictional Amendment beyond the definition of a "covered class action." *See* Lowenthal, 17 U. Pa. J. Bus. L. at 764-65. But, tellingly, these courts have been unable to define this other limitation. *Id.*

i. The Jurisdictional Amendment Cannot Refer to Section 16(b)

Section 16(b) defines a category of claims "based upon the statutory or common law of any State or subdivision thereof" that plaintiffs are precluded from bringing in covered class actions relating to nationally traded securities. 15 U.S.C. § 77p(b). Some courts have accordingly argued that SLUSA's Jurisdictional Amendment only strips state courts of jurisdiction over covered class actions that plead those ***state law*** claims precluded by Section 16(b). *See* Lowenthal, 17 U. Pa. J. Bus. L. at 771-72. But that cannot be right.

First, the text of the Jurisdictional Amendment, and the Securities Act's Jurisdictional Provision more generally, addresses only ***federal law*** claims, not the state law claims described in Section 16(b). The Jurisdictional Provision refers to suits to enforce liabilities or duties "created by this subchapter." 15 U.S.C. § 77v(a) (1987) (amended 1998). Rights or duties arising under state law are, by definition, not "created by" the Securities Act.

Second, the implication of this approach—that state courts lack subject-matter jurisdiction over cases covered by Section 16(b)—has been squarely rejected by this Court in *Kircher v. Putnam Funds Trust*, 547 U.S. 633 (2006), which held that, under SLUSA, state courts *retain* subject-matter jurisdiction over these actions and claims. *Kircher* rejected the Seventh Circuit's notion that only federal courts have jurisdiction over cases alleging claims set forth in Section 16(b), and held that "nothing in [SLUSA] gives the federal courts exclusive jurisdiction over preclusion decisions" under Section 16(b). *Id.* at 646.

In light of *Kircher*, the category of actions over which the Jurisdictional Amendment eliminates state court jurisdiction cannot be the category of actions asserting *state law* claims precluded in Section 16(b)—*Kircher* establishes that these are precisely the actions over which state courts *retain* jurisdiction, even if only for the purpose of determining whether Section 16(b) applies and, if so, granting dismissal. *See* Lowenthal, 17 U. Pa. J. Bus. L. at 775.

ii. The Jurisdictional Amendment Cannot Refer to Section 16(c)

Alternatively, some courts and commentators ignore the impact of the Jurisdictional Amendment and instead focus on SLUSA's removal provision for certain covered class actions, Section 16(c), and its corresponding amendment to Section 22(a) of the Securities Act that exempts such actions from the

Removal Bar (the "Removal Bar Amendment"), which those authorities read as prohibiting the removal of Securities Act class actions.[3] *See* Lowenthal, 17 U. Pa. J. Bus. L. at 783-86. Neither provision, however, is relevant.

First, to the extent Section 16(c) permits removal of the same state law actions "precluded" by Section 16(b), it cannot give the Jurisdictional Amendment meaning for all of the same reasons already discussed in relation to Section 16(b).

Second, focusing exclusively on the Removal Bar Amendment improperly assumes that the Removal Bar applies to all actions alleging Securities Act claims, without recognizing that the Removal Bar applies only to cases brought in state courts "of competent jurisdiction." 15 U.S.C. § 77v(a). Since the Jurisdictional Amendment strips state courts of jurisdiction over Securities Act class actions, state courts are no longer courts "of competent jurisdiction" to hear such actions and the removal bar does not apply. *See* Lowenthal, 17 U. Pa. J. Bus. L. at 783.

Finally, to the extent Section 16(c)'s removal provision refers to federal claims not addressed by Section 16(b)'s preclusion provision, there is no

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[3] The Removal Bar Amendment states: "*Except as provided in section 77p(c) of this title* [Section 16(c) of the Securities Act], no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States." 15 U.S.C. § 77v(a) (language added by the Removal Bar Amendment emphasized).

indication in SLUSA's text that Congress intended to link the distinct concepts of jurisdiction and removal, and to limit the Jurisdictional Amendment by reference to the Removal Bar Amendment. *See* Lowenthal, 17 U. Pa. J. Bus. L. at 787. The Jurisdictional Amendment and the Removal Bar Amendment were passed in two different and co-equal sections of SLUSA—Section 101(a)(3)(A) versus Section 101(a)(3)(B)—and both must be read as having some independent effect, not as mere "surplusage." *See, e.g.*, *Dunn v. CFTC*, 519 U.S. 465, 472 (1997).[4] Neither amendment cross-references the other. Nor are the amendments linked through a common cross-reference to a third statutory provision. While the Removal Bar Amendment includes a cross-reference to Section 16(c), the Jurisdictional Amendment does not it cross-references Section 16 as a whole. *See* Lowenthal, 17 U. Pa. J. Bus. L.

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[4] Notably, adopting *amici*'s approach to interpreting the Jurisdictional Amendment would not render the Removal Bar Amendment as surplusage: while the Jurisdictional Amendment can clearly divest state courts of jurisdiction over class actions alleging only federal Securities Act claims, *see, e.g.*, *Haywood v. Drown*, 556 U.S. 729, 758 (2009), it is not clear that the Jurisdictional Amendment can fully divest state courts of jurisdiction over class actions alleging both federal and state law claims. *See* Lowenthal, 17 U. Pa. J. Bus. L. at 788 n.215. The Removal Bar Amendment "thus was needed to eliminate any doubt about the removability of cases that include both state law claims and . . . claims based on the Securities Act," *In re Tyco Int'l, Ltd.*, 322 F. Supp. 2d 116, 120 (D.N.H. 2004)—even if state courts retain jurisdiction over such cases, they can be removed to federal court. *See* Lowenthal, 17 U. Pa. J. Bus. L. at 788 n.215.

at 787. Under ordinary rules of statutory construction, "when the legislature uses certain language in one part of the statute and different language in another . . . different meanings were intended." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (quoting Norman J. Singer, *Statutes and Statutory Construction* § 46:06, at 194 (6th ed. 2000)).

II. PRECEPTS OF FEDERALISM CONFIRM THAT STATE COURTS LACK JURISDICTION OVER SECURITIES ACT CLASS ACTIONS

SLUSA's Jurisdictional Amendment divested state courts of jurisdiction over *some* category of covered class actions that allege Securities Act claims. If one were to argue, as Respondents must, that this category excludes covered class actions that allege solely Securities Act claims, then by definition it must include a category of covered class actions that allege Securities Act claims *together with state law claims*. Under this hypothesis, state courts retain jurisdiction over covered class actions that allege only federal Securities Act claims, but lose jurisdiction if state claims are brought along with the federal claims, *by virtue of the presence of state claims*. In addition to defying common sense, this interpretation presents concerns of a constitutional dimension that weigh heavily against its adoption. *See* Lowenthal, 17 U. Pa. J. Bus. L. at 777-78.

In general, "[t]he States . . . have great latitude to establish the structure and jurisdiction of their own courts." *Johnson v. Fankell*, 520 U.S. 911, 919 (1997) (quoting *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 372 (1990)). This Court has never endorsed the practice of stripping state courts of jurisdiction over their own state law. *See* Anthony J. Bellia, Jr., *Congressional Power and State Court Jurisdiction*, 94 GEO. L.J. 949, 1006-09 (2006); *see also Ponzi v. Fessenden*, 258 U.S. 254, 259 (1922) ("We live in the jurisdiction of two sovereignties, each having its own system of courts to declare and enforce its laws in common territory . . . [t]he people for whose benefit these two systems are maintained are deeply interested that each system shall be effective and unhindered in its vindication of its laws"). Consequently, an interpretation of the Jurisdictional Amendment that would divest state courts of jurisdiction over claims based on state law is highly questionable. *See* Lowenthal, 17 U. Pa. J. Bus. L. at 778.[5]

Rather than presume that Congress enacted a questionable policy of stripping state courts of concurrent jurisdiction *over their own state law*, the Jurisdictional Amendment must eliminate

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[5] Congress would have been well within its authority to *preempt* state securities laws. But SLUSA is not a "preemption provision" and "does not itself displace state law with federal law"; rather, all that SLUSA does with respect to state law claims is to "make[] some state law claims nonactionable *through the class-action device* in federal as well as state court." *See Kircher*, 547 U.S. at 636 n.1 (emphasis added).

state courts of jurisdiction over Securities Act class claims, including Exclusively Federal Covered Class Actions—an act that is plainly within Congress's power. *See, e.g.*, *Haywood v. Drown*, 556 U.S. 729, 758 (2009) ("[W]here a right arises under a law of the United States, Congress may, if it sees fit, give to the Federal courts exclusive jurisdiction.") (quoting *Claflin v. Houseman*, 93 U.S. 130, 136–37 (1876)) (internal brackets omitted); *see also CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2188 (2014) (affirming long-held presumption that a court should assume federal law did not supersede power of states "unless that was the clear and manifest purpose of Congress") (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)); *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058, 1068 (2014) ("Under numerous provisions, [SLUSA] purposefully maintains state legal authority, especially over matters that are primarily of state concern."); *Younger v. Harris*, 401 U.S. 37, 44 (1971) ("[T]he National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.").

III. THE LEGISLATIVE HISTORY AND PURPOSES OF THE PSLRA AND SLUSA CONFIRM THAT THE JURISDICTIONAL AMENDMENT DIVESTS STATE COURTS OF JURISDICTION OVER SECURITIES ACT CLASS ACTIONS

The legislative history and stated purposes of the PSLRA and SLUSA further support the conclusion that Congress, in enacting SLUSA, intended all Securities Act class actions, including Exclusively Federal Covered Class Actions, to be litigated in the federal courts.

Congress expressly set forth SLUSA's goals at the start of the Act, including recognizing that "a number of securities class action lawsuits *have shifted from Federal to State courts*" and that "*this shift has prevented [the PSLRA] from fully achieving its objectives.*" SLUSA, Pub. L. No. 105-353, § 2, 112 Stat. 3227, 3227 (emphasis added). In doing so, it drew no distinction between securities class actions based on state law and those based on federal law, nor did it in any way suggest that Exclusively Federal Covered Class Actions would somehow be exempt from SLUSA.

The legislative history leading up to the enactment of SLUSA further confirms this conclusion. The Senate subcommittee introducing the bill that would become SLUSA characterized it as "basically say[ing] that for class action suits, and class action suits only, where you are dealing with a stock that is traded nationally, so there is clearly

an overriding national interest, that those suits have to be filed in Federal court." SLUSA: Hearing before the Subcomm. on Sec. of the S. Comm. on Banking, Hous., & Urban Affairs, 105th Cong. 2 (1997) ("S. Subcomm. 1997 SLUSA Hearing") (opening statement of Sen. Phil Gramm, Chairman, Subcomm. on Sec. of S. Comm. on Banking, Hous. & Urban Affairs). No exception was made for Exclusively Federal Covered Class Actions. The House committee that reported on the bill similarly stated that SLUSA's intent was to "make Federal court the exclusive venue for securities fraud class action litigation," H.R. Rep. No. 105-640, at 10 (1998), without noting any exceptions. Likewise, the joint House/Senate conference committee explained that "[t]he purpose of [SLUSA] is to prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than in Federal, court," H.R. Rep. No. 105-803, at 13 (1998), again without noting any exceptions.

Statements of members of Congress during the debates further evidence this shared understanding that "[SLUSA] would in effect require that *every* large securities class action be brought into federal court." 144 Cong. Rec. S4778-03,S4797 (1998) (statement of Sen. Dianne Feinstein) (emphasis added); *accord* H. Subcomm. SLUSA Hearing at 1 (statement of Rep. Tom Bliley, Chairman, Comm. on Commerce) ("This legislation makes Federal court the exclusive venue for securities class actions. In this way, the trial bar will not be able to use State court as a means of evading the changes

of the [PSLRA]."); *id.* at 4 (statement of Rep. Rick White) ("What [SLUSA] is all about is simply to realize the intent of the [PSLRA]. It does that by making sure that class action suits with securities that are traded on the three major securities trading exchanges in our country have to be subject to the rules that we passed last time [in the PSLRA] and have to go to Federal court.").

Commentators reviewing the legislation as it was pending before Congress expressed the same contemporaneous understanding. Michael A. Perino, *Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 Stan. L. Rev. 273, 335 (1998) (writing in 1998 that the pending bill that would become SLUSA, as well as two other alternative bills, "[a]ll . . . eliminate concurrent state jurisdiction over 1933 Act claims in favor of exclusive jurisdiction in the federal courts"). Even witnesses who testified before Congress to *oppose* SLUSA's enactment and who argued that securities class actions alleging state law claims should be allowed to remain in state court agreed that class actions alleging claims under the federal securities laws should only proceed in federal court. *See* H. Subcomm. SLUSA Hearing at 118 (statements of Rep. Rick White and Richard Painter, Professor, Cornell University Law School) ("MR. WHITE. . . . I take it you wouldn't support turning the 1934 or 1933 Federal securities act claims over to State courts. I mean, there is a place for a national standard, I take it, at least in some areas. MR. PAINTER. Well, yes.").

Those who oppose the removal of Exclusively Federal Covered Class Actions to federal court correctly note that one of Congress's objectives in enacting SLUSA was to preclude certain state law claims "to limit the conduct of securities class actions under State law." H.R. Rep. 105-640, at 1 (1998). But the fact that this was one of Congress's multiple objectives one it achieved by promulgating Section 16(b) in SLUSA § 101(a)(1)—does not mean that Congress did not also intend to divest state courts of concurrent subject-matter jurisdiction over securities class actions under federal law, a separate goal that Congress achieved by promulgating the separate Jurisdictional Amendment in SLUSA § 101(a)(3)(A). *See* Lowenthal, 17 U. Pa. J. Bus. L. at 781.

Had Congress intended to enact the paradoxical result that securities class actions alleging state law claims would be removable to federal court but class actions alleging only federal law claims would not, one would expect it to have been mentioned somewhere in the legislative record. *Id.* No such statement exists.

IV. LIMITING SECURITIES ACT CLASS ACTIONS TO FEDERAL COURTS PROMOTES CERTAINTY AND UNIFORMITY IN THE SECURITIES LAWS, WHICH IS ESSENTIAL TO THE CAPITAL FORMATION PROCESS

This Court has long recognized that the securities laws constitute an "area that demands

certainty and predictability." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188-90 (1994) (quoting *Pinter v. Dahl*, 486 U.S. 622, 652 (1988)); *see also Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1105-06 (1991) (rejecting theory that would lead to "speculative claims and procedural intractability" in securities litigation and in which "[t]he issues would be hazy, their litigation protracted, and their resolution unreliable"). Uncertainty in the securities laws leads to "the undesirable result of decisions 'made on an ad hoc basis, offering little predictive value'" to issuers and other participants in the securities industry. *Cent. Bank*, 511 U.S. at 188 (citation omitted). Such unpredictability raises the costs associated not only with securities litigation, but with capital formation more generally, undermining the capital markets and enforcement of the securities laws. *Id.* at 188-89 (discussing effects of unclear rules in securities litigation, including raising costs of litigation and settlement, discouraging professional assistance to newer or smaller companies that carry higher risk of failure and resulting litigation, and raising professional costs that will be passed onto businesses and their shareholders). Limiting Securities Act class actions to federal courts is necessary to ensure certainty and predictability in the administration of the federal securities laws.

"Prior to the passage of the [PSLRA], there was essentially no significant securities class action litigation brought in State court." H.R. Rep. No. 105-640, at 10 (1998). As a result, federal courts,

the de facto exclusive forums for such claims for 60 years, have acquired unique experience and developed a body of precedent important to businesses seeking to raise capital. While state courts can be guided by the Securities Act pronouncements of the lower federal courts, they are not bound by them. *See Johnson v. Williams*, 568 U.S. 289, 305 (2013) ("[T]he views of the federal courts of appeals do not bind the California Supreme Court when it decides a federal constitutional question, and disagreeing with the lower federal courts is not the same as ignoring federal law."); *see also Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) ("[N]either federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation."). Similarly, where state legislation permits, state courts can be guided by federal procedural rules, including under Rule 23, and decisions by federal courts interpreting those Rules, but they are not bound by those Rules or decisions. *See, e.g., BB Buggies, Inc. v. Leon*, 150 So. 3d 90, 96 (Miss. 2014) ("Because our rules are generally modeled after the Federal Rules of Civil Procedure, we often consider federal authority when construing similar rules. However, we are not bound by federal authority when interpreting our procedural rules.") (citations omitted). Indeed, they are free even to tinker with this Court's construction of the Federal Rules of Civil Procedure—except where the Constitution itself mandates the result. *See* U.S. Const. art. VI, cl. 2. Moreover, federal review of the Securities Act

pronouncements by state courts would be limited to this Court, through the certiorari process.

Over time, the result would likely be that national issuers would be exposed to precisely the "patchwork" of inconsistent rules across states that SLUSA was enacted to prevent. *See* S. Subcomm. 1997 SLUSA Hearing at 29, 83 (statement of Daniel Cooperman, Senior Vice President, General Counsel, and Secretary, Oracle Corp., on behalf of the Software Publishers Association) ("The question before us in evaluating the Uniform Standards Act is whether the predictability and stability of our capital markets is being undermined by a patchwork of duplicative and, in some cases, inconsistent State laws"); *id.* at 33 (statement of Michael A. Perino, Lecturer at Stanford Law School and Co-Director of the Law School's Roberts Program in Law, Business, and Corporate Governance) ("[H]aving a patchwork quilt of different rules that apply to different customers in different States makes no sense at all.").

The better result, and the only one consistent with SLUSA's text, purposes, and history, is to hold that Exclusively Federal Covered Class Actions must continue to be litigated in the federal courts, just as they predominantly have been since 1933.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to reverse the decision below and

to hold that SLUSA deprives state courts of subject-matter jurisdiction over covered class actions alleging only federal Securities Act claims.

Respectfully submitted,

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CYAN, INC., ET AL.,
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v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, ET AL.,
Respondents.

On Writ of Certiorari to the Court of Appeal of the State of California First Appellate District

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INTEREST OF *AMICI CURIAE*[1]

Amici consist of fiduciary entities charged with the responsibility for administering more than $3.5 billion in pension fund and other employee benefit plan assets ("Funds") on behalf of more than 16,000 beneficiaries. As part of their duties to protect the value of the Funds entrusted to their care, *amici* have participated in class-action lawsuits (including class actions under the Securities Act of 1933 brought in state court) seeking to recover damages from securities issuers that have violated federal securities laws and caused losses to their Funds. Because *amici* manage the retirement benefit assets of civil servants, *amici* have a longstanding institutional interest in preserving the rights that investors historically have had in choosing to bring actions asserting only claims under the Securities Act of 1933 in either federal or state court.

Amici consist of the following:

Westmoreland County Employee Retirement System;

Oklahoma Police Pension and Retirement System; and

Bucks County Employees' Retirement System and Trust.

Respondents ably demonstrate in their brief why the straightforward meaning of the relevant statutory

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* also represent that all parties have consented to the filing of this brief; letters reflecting their blanket consent to the filing of *amicus* briefs are on file with the Clerk.

text warrants affirmance here. *Amici* support respondents' arguments in full. *Amici* write separately to expand on another point: to show that – even assuming that the statutory text alone were not dispositive in favor of respondents' interpretation – the legislative history leading up to the amendments made by the Securities Litigation Uniform Standards Act of 1998 supports affirmance.

INTRODUCTION AND SUMMARY

When Congress enacted the Securities Act of 1933 ("1933 Act"), it determined that allowing investors to sue in state court would best serve that statute's scheme of private enforcement. The strict-liability cause of action that the 1933 Act created mirrored many States' then-existing "blue-sky laws" that protected purchasers of securities from public offerings based on false or misleading registration statements. Congress thus recognized state courts' concurrent jurisdiction to hear 1933 Act claims, and it rejected subsequent attempts to strip state courts of that jurisdiction. For the first 65 years after Congress passed the 1933 Act – including for decades after the first securities class actions in the late 1930s[2] – investors' ability to bring 1933 Act claims in state court was unquestioned.

This case presents the question whether Congress, in the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), intended to upend that framework by divesting state courts of their long-held jurisdiction to hear state-court class actions asserting only 1933 Act claims. Respondents have persuasively

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[2] *See, e.g., Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940) (upholding issuance of temporary injunction in 1933 Act class action).

demonstrated that Congress had no such intent. *Amici* write to amplify those points and to explain in greater detail why SLUSA's legislative history evinces Congress's intent not to eliminate state-court jurisdiction over 1933 Act class actions, but instead to prevent plaintiffs from evading federal law by asserting *state-law* securities claims in state court.

The legislative debates surrounding SLUSA focused on a narrow set of problems that state-court actions alleging only 1933 Act claims do not implicate. Those problems stemmed primarily from plaintiffs' evasion of federal standards for pleading securities-fraud claims under the Securities Exchange Act of 1934, the circumvention of federal safe-harbor rules, and the use of state-law claims to bypass the federal discovery stay. Those problems were unique to state-law securities claims and did not arise in state-court actions asserting exclusively 1933 Act claims (which are predicated on strict liability for misstatements in offering materials, rather than fraud). For that reason, there is no evidence in SLUSA's legislative history that Congress was concerned with state courts' exercise of concurrent jurisdiction over 1933 Act claims. Indeed, a bill was introduced in Congress in 1997 that would have explicitly stripped state courts of their 1933 Act jurisdiction, but Congress declined to adopt it. Congress did not intend SLUSA to accomplish indirectly what that failed jurisdictional bill would have done directly.

Further, petitioners' contrary reading of SLUSA's legislative history is unpersuasive. Read in context, the snippets of legislative history that petitioners identify merely demonstrate Congress's general concern with the use of state-court class-action litigation to evade federal securities law. That concern is inapplicable to 1933 Act claims and does not suggest

that Congress intended SLUSA to overhaul decades of state-court jurisdiction over such claims. If anything, the parts of the legislative history cited by petitioners reinforce that SLUSA was not aimed at state-court class actions asserting exclusively 1933 Act claims.

ARGUMENT

I. WHEN SLUSA WAS ENACTED, STATE COURTS HAD POSSESSED CONCURRENT JURISDICTION OVER 1933 ACT CLAIMS FOR MORE THAN 60 YEARS

Congress's purpose in enacting the Securities Litigation Uniform Standards Act of 1998 ("SLUSA")[3] is best understood in light of the decades-long history of the two primary federal securities statutes, from 1933 and 1934, that SLUSA amended.[4] That history begins with the Securities Act of 1933 ("1933 Act").[5]

The 1933 Act. From its very inception, the 1933 Act recognized state courts' concurrent jurisdiction over private suits brought under the robust civil-liability provisions it enacted. As President Franklin D. Roosevelt explained, the 1933 Act was designed to "bring back public confidence" in securities offerings by "put[ting] the burden of telling the whole truth on the seller" in such offerings. President of the United States, Federal Supervision of Traffic in Investment Securities, H.R. Doc. No. 73-12, at 1 (1933) (President Roosevelt's message to Congress). The 1933 Act

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[3] Pub. L. No. 105-353, 112 Stat. 3227 (1998).

[4] *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (interpreting statute based in part on "legislation that Congress ha[d] enacted over the past 35 years").

[5] Act of May 27, 1933, ch. 38, tit. I, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77a *et seq.*).

implemented that objective not only by giving the Federal Trade Commission ("FTC") enforcement authority against issuers that made misstatements in their offering documents, *see* 1933 Act §§ 2(5), 20, 48 Stat. 75, 86, but also by creating civil-liability provisions allowing injured investors to file private causes of action, *see id.* §§ 11, 12, 48 Stat. 82-84. Those civil-liability provisions were essential to the 1933 Act's original design.[6]

The 73d Congress determined that the 1933 Act's scheme of civil liability would work best if investors had the choice of suing in state court. That determination reflected the parallels between the 1933 Act and existing state "blue-sky laws." Many States had enacted such laws to impose civil liability for misstatements appearing in offering documents,[7] but

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[6] *See* JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE 83, 587 & n.45 (1982) ("Without the stringent civil liability sections, . . . the FTC would not have been able to compel firms attempting to sell securities to the public to acknowledge 'such facts as the pendency of damaging litigation' or the existence of 'outstanding liabilities, misleading accounting practices, . . . and the like.'") (quoting Letter from James M. Landis to President Franklin D. Roosevelt (Dec. 4, 1933)); James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 Geo. Wash. L. Rev. 29, 35 (1959-1960) ("We were particularly anxious through the imposition of adequate civil liabilities to assure the performance by corporate directors and officers of their fiduciary obligations and to impress upon accountants the necessity for independence and a thorough professional approach.").

[7] *See, e.g.*, Act of July 1, 1912, No. 40, 1912 La. Acts 47; Act of Aug. 21, 1913, 33d Leg., 1st C.S., ch. 32, § 6, 1913 Tex. Gen. Laws 66, 68-69; Ohio Rev. Code § 6373.18 (1915); Act of Apr. 3, 1916, ch. 97, § 6, 1916 Miss. Laws 87, 91; Act of Mar. 22, 1919, ch. 49, § 4, 1919 Okla. Sess. Laws 77, 80; Act of Sept. 29, 1919, No. 660, § 3, 1919 Ala. Laws 946, 949.

issuers were avoiding liability under those laws "by establishing an office in one State and selling across State lines to people in other States under protection of interstate commerce." 77 Cong. Rec. 2935 (1933) (statement of Rep. Virgil Chapman).

Congress sought to curtail that behavior by creating national federal regulation of securities offerings in the 1933 Act. In doing so, it recognized that state-court jurisdiction would best comport with the tradition of state "blue-sky laws" upon which it intended the 1933 Act to improve. The 1933 Act thus included section 22(a), which recognized state courts' concurrent jurisdiction over all 1933 Act claims and barred defendants from removing to federal court actions asserting exclusively such claims. 1933 Act § 22(a), 48 Stat. 86-87 (codified as amended at 15 U.S.C. § 77v(a)). Due to section 22(a), as one Congressman explained at the time, "[c]ases under the [1933] act may be brought in the State courts, and no such case may be removed from a State court of competent jurisdiction to a United States court." 77 Cong. Rec. 2948 (1933) (statement of Rep. Walter Lambeth). That result was in keeping with the tradition of state-law regulation to which securities offerings historically were subject.

Section 22(a) also reflected the 73d Congress's conclusion that, for the 1933 Act's civil-liability mechanism to work properly, investors needed the option of bringing lawsuits in state courts. In opposing attempts made the following year to strip state courts of jurisdiction over 1933 Act claims,[8]

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[8] *See, e.g.*, S. 3301, 73d Cong. § 9 (1934) (proposing to strike out "concurrent with State and Territorial courts" from section 22(a)); 78 Cong. Rec. 8703 (1934) (proposing to "insert[] before

James Landis – the 1933 Act's principal drafter and then-FTC Commissioner – told Congress that it was "undesirable" for Congress to "eliminate[] the concurrent jurisdiction of State and Territorial courts" over 1933 Act claims. 78 Cong. Rec. 8714, 8717 (1934). Congress thus rejected subsequent attempts to eliminate state-court concurrent jurisdiction over 1933 Act claims. *See, e.g., supra* note 8. State-court jurisdiction over 1933 Act claims continued largely unquestioned for decades thereafter.

The 1934 Act. By contrast, Congress gave federal courts exclusive jurisdiction over claims arising under the Securities Exchange Act of 1934 ("1934 Act")[9] because Congress originally intended federal enforcement to be central to that statute. The 1934 Act established a far-reaching regulatory scheme and created the Securities and Exchange Commission ("SEC") to administer it. Unlike the 1933 Act, the 1934 Act was not geared toward public offerings for new securities – which States had an existing interest in regulating under their blue-sky laws – but instead focused on securities that were already trading on national exchanges. Given the 1934 Act's broad focus on national securities exchanges, Congress originally intended that the SEC be the statute's primary enforcer.

Consistent with its focus on federal regulatory enforcement, the 1934 Act conferred on federal courts "exclusive jurisdiction" over all claims brought thereunder. 1934 Act § 27, 48 Stat. 902 (codified as amended at 15 U.S.C. § 78aa(a)). That stood in stark

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the word 'jurisdiction' the word 'exclusive' and . . . strik[e] out 'concurrent with State and Territorial courts'").

[9] Act of June 6, 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78a *et seq.*).

contrast to the 1933 Act, whose scheme of private civil enforcement distinguished it from the 1934 Act and led Congress to provide for state-court concurrent jurisdiction over private actions. *Compare* 78 Cong. Rec. 8099 (1934) (amending the securities exchange bill by "insert[ing] the word 'exclusive'" to make "entirely clear" that "the bill as drawn meant exclusive") (statement of Rep. Sam Rayburn) *with id.* at 8717 (statements by FTC Commissioner James Landis opposing proposal to make similar amendments to the 1933 Act).

In short, the 1933 Act (unlike the 1934 Act) has always given investors the option of a state forum for any and all private causes of action they choose to assert under that statute.

II. CONGRESS DID NOT INTEND SLUSA TO UPEND THE LONG TRADITION OF CONCURRENT JURISDICTION OVER 1933 ACT CLAIMS

A. SLUSA Was Narrowly Targeted And Did Not Address State-Court Jurisdiction Over 1933 Act Claims

SLUSA was not intended to alter the well-settled, longstanding principle of concurrent state-court jurisdiction over 1933 Act claims. Congress enacted SLUSA to address a "very narrow" set of concerns it identified with the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 ("PSLRA").[10] The PSLRA had sought to curb abusive

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[10] *See Implementation of the Private Securities Litigation Reform Act: Hearing Before the Subcomm. on Fin. & Hazardous Materials of the H. Comm. on Commerce*, 105th Cong. 39 (Oct. 21, 1997) ("*1997 House Hearing*") ("I don't think this hearing or the legislation that Mr. White and I have introduced is about recodifying securities laws. We're looking at some very, very

"federal securities fraud class actions" by "plac[ing] special burdens on plaintiffs" asserting such actions. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 82 (2006). To that end, the PSLRA's primary reforms were (1) to impose heightened pleading standards on 1934 Act claims, *see* 15 U.S.C. § 78u-4(b)(1), (2); (2) to create a safe harbor for forward-looking statements, *see id.* § 77z-2; and (3) to stay discovery in private securities actions pending resolution of any motion to dismiss, *see id.* §§ 77z-1(b), 78u-4(b)(3). The PSLRA also enacted other procedural reforms that Congress made applicable only to cases brought in federal court, such as a lead-plaintiff-appointment provision and a provision governing attorney's fees. *See* Resp. Br. 2-3.

Congress's concerns in the wake of the PSLRA did not extend to state-court class actions asserting exclusively 1933 Act claims.[11] Instead, SLUSA's primary stated purpose was to shore up the PSLRA by "limit[ing] the conduct of securities class actions under State law." SLUSA preamble, 112 Stat. 3227. As the Senate Committee Report explained, SLUSA reflected Congress's specific intention "to prevent *state laws* from being used to frustrate the operation and goals of the [PSLRA]." S. Rep. No. 105-182, at 2 (1998) (emphasis added). That focus on state-law

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narrow areas . . . .") (statement of co-sponsor Rep. Anna G. Eshoo).

[11] As respondents explain (at 11-17), SLUSA's text compels that same conclusion. While SLUSA's text divests state courts of jurisdiction over so-called "mixed" cases – covered class actions that assert both 1933 Act claims *and* precluded state-law claims – it does not divest state courts of concurrent jurisdiction over class actions that assert *exclusively* 1933 Act claims. *See* Resp. Br. 12-13. Respondents' interpretation of the text accords fully with SLUSA's legislative history, as explained below.

claims, and the particular risks to the PSLRA that those claims posed, *see infra* Part II.B, did not extend to 1933 Act claims.

In fact, during the legislative debates over SLUSA, Congress affirmatively declined to create exclusive federal jurisdiction over 1933 Act claims. In May 1997, when Congress was considering SLUSA, Rep. Tom Campbell introduced a bill entitled the Securities Litigation Improvement Act of 1997, H.R. 1653, 105th Cong. (1997). Like the failed attempts that had come before it in 1934, Rep. Campbell's proposal would have amended section 22(a) of the 1933 Act "by inserting 'exclusive' before 'jurisdiction'" and "by striking 'and, concurrent with State and Territorial courts.'" *Id.* § 2(a)(2)(A). But Congress declined to adopt that proposal and enacted SLUSA instead. Congress's failure to adopt a proposed bill that would have explicitly stripped state courts of jurisdiction over 1933 Act claims is strong evidence that it did not intend SLUSA to do so. *See Brown & Williamson*, 529 U.S. at 144 (rejecting proposed interpretation of statute where Congress had "considered and rejected bills" that would have explicitly adopted such an interpretation).

That is particularly true given the textual differences between Rep. Campbell's failed bill and the enacted SLUSA. The former, using clear and plain language, proposed that Congress make federal jurisdiction over 1933 Act claims "exclusive." The latter, by contrast, contained no such language. Petitioners are therefore left with a remarkably complex interpretation of an otherwise unremarkable set of statutory cross-references inserted by the "Conforming Amendments" section of SLUSA – from which they argue that Congress intended to reach

the same substantive result that Rep. Campbell had unsuccessfully proposed in straightforward terms. SLUSA § 101(a)(3), 112 Stat. 3230. But Congress, as this Court long has made clear, does not make such dramatic changes through linguistic subtleties. *See Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001); *see also Director of Revenue v. CoBank ACB*, 531 U.S. 316, 324 (2001) (rejecting argument that "Congress made a radical – but entirely implicit – change in the [law] . . . with [an amendment that] was merely one of numerous 'technical and conforming amendments'"). Had the 105th Congress intended to strip state courts of their concurrent jurisdiction over 1933 Act class actions – which at that point had existed for decades – it would have said so clearly.

B. SLUSA Was Aimed At Concerns About State-Law Securities Lawsuits

1. SLUSA's focus on state-law securities claims, rather than state-court actions asserting only 1933 Act claims, reflected the statute's core purpose. The 105th Congress's intent was to prevent plaintiffs from "circumventing [the PSLRA's] restrictions by bringing securities class actions *under state law* in state court." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2413 (2014) (emphasis added). Four particular concerns – all of which Congress recognized and all of which animated SLUSA's reforms – illustrate that core purpose.

First, Congress found that plaintiffs were bringing state-law fraud claims to bypass the heightened pleading standards that the PSLRA imposed on claims brought under the 1934 Act. In amending the 1934 Act, the PSLRA required plaintiffs alleging fraud to state with particularity facts giving rise to a

strong inference of the defendant's fraudulent intent. PSLRA § 101(b), 109 Stat. 746-47 (codified as amended at 15 U.S.C. § 78u-4(b)(2)). Those heightened pleading standards were arguably the PSLRA's most significant reform: by curbing lawsuits (brought largely in the Ninth Circuit) based on conclusory scienter allegations,[12] Congress intended the PSLRA to curtail "[u]nwarranted fraud claims" under the 1934 Act. H.R. Conf. Rep. No. 104-369, at 41 (1995).

In the two years following the enactment of the PSLRA, however, plaintiffs began circumventing that key reform by asserting fraud claims under state statutory or common law, which were not subject to the PSLRA's heightened pleading standards for 1934 Act § 10(b) fraud claims. *See 1997 House Hearing* 23-24 (statement of SEC Chairman Arthur Levitt analyzing complaints filed in state court post-PSLRA). As the House Commerce Committee Report accompanying SLUSA explained, "the migration to State court was fueled by a desire to circumvent the more stringent requirements of the heightened pleading standard adopted under the [PSLRA]." H.R. Rep. No. 105-640, at 10-11 (1998); *see also* S. Rep. No. 105-182, at 3 (noting "'a "substitution effect" whereby plaintiff's counsel file state court complaints when the underlying facts appear not to satisfy new, more stringent federal pleading requirements'") (quoting SEC Commissioner Joseph Grundfest and Stanford Law School faculty member Michael A. Perino).

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[12] Before the PSLRA, the Ninth Circuit and a majority of other courts construed Federal Rule of Civil Procedure 9(b) literally to permit plaintiffs to "aver scienter generally . . . simply by saying that scienter existed." *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1545, 1547 (9th Cir. 1994) (en banc).

That problem was unique to 1934 Act claims. While the PSLRA amended the 1934 Act to heighten pleading standards with respect to both scienter and material falsity, *see* 15 U.S.C. § 78u-4(b)(1), (2), it imposed no heightened pleading standards on 1933 Act claims – even though material falsity *is* an element of 1933 Act claims.[13] Thus, to the extent certain securities class-action plaintiffs were looking to bypass the PSLRA's pleading reforms, there were no such reforms to "bypass" in the 1933 Act context. Instead, the pleading "problem" was that securities plaintiffs alleging fraud were repackaging what previously had been 1934 Act claims as state-law fraud claims. H.R. Rep. No. 105-640, at 10-11.[14]

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[13] 1933 Act claims have no scienter (intent to defraud) element. As certain of petitioners' *amici* have noted, some courts have held that 1933 Act claims that "sound in fraud" can be subject to the heightened pleading standard of Rule 9(b). *See Rombach v. Chang*, 355 F.3d 164, 170 (2d Cir. 2004). But that point is essentially irrelevant to state-court actions asserting exclusively 1933 Act claims, which as a practical matter almost always disclaim any allegation of fraud or are otherwise limited to strict-liability allegations. *See, e.g., Garber v. Legg Mason, Inc.*, 537 F. Supp. 2d 597, 612 (S.D.N.Y. 2008) (disclaimer of any fraud allegations effectively removes 1933 Act complaints from any heightened pleading standards), *aff'd*, 347 F. App'x 665 (2d Cir. 2009).

[14] Some of petitioners' *amici* suggest that 1933 Act claims need to be litigated in federal court to afford issuers the benefit of the heightened federal pleading standard articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *See, e.g.*, Washington Legal Found. *Amicus* Br. 11-15, 32. Whatever the merits of that goal as a policy matter, it did not animate Congress when enacting the PSLRA or SLUSA. Both of those statutes predated *Twombly* and *Iqbal* by many years, and neither statute imposed any type of heightened pleading standard on 1933 Act claims.

Congress's solution to that problem in enacting SLUSA was simple: "to make Federal court the exclusive venue for securities *fraud* class action litigation." *Id.* at 10 (emphasis added). Indeed, SLUSA itself states that Congress intended "to prevent certain State private securities class action lawsuits *alleging fraud* from being used to frustrate the objectives of the [PSLRA]." SLUSA § 2(5), 112 Stat. 3227 (emphasis added). As respondents explain (at 27-28), divesting state courts of jurisdiction over class actions asserting only 1933 Act claims would have done nothing to advance that purpose.

Second, in enacting SLUSA, Congress found that investors were asserting state-law claims to prevent issuers from invoking the PSLRA's safe harbor for forward-looking statements. The PSLRA added safe-harbor provisions to both the 1933 Act and the 1934 Act to protect "forward-looking statements" that are accompanied by meaningful cautionary language or made without actual knowledge that they were false or misleading. *See* PSLRA §§ 102(a), (b), 109 Stat. 749, 753 (codified at 15 U.S.C. §§ 77z-2, 78u-5). Congress intended this safe harbor "to enhance market efficiency by encouraging companies to disclose forward-looking information." H.R. Conf. Rep. No. 104-369, at 43.

However, Congress found that the threat of state-law actions had a "chilling effect" on issuers' use of the safe harbor. S. Rep. No. 105-182, at 4. As Sen. Orrin Hatch explained, "actions [we]re often filed in state courts in order to circumvent [the safe harbor]. The resulting threat of frivolous lawsuits and liability under state law discourage[d] corporate disclosure of forward-looking information to investors, eroding investor protection and jeopardizing the capital

markets that are so important to the productivity of the fast-growing sectors of our economy." 144 Cong. Rec. S4802 (daily ed. May 13, 1998) (statement of Sen. Orrin Hatch).[15] That concern again demonstrates Congress's focus on actions asserting state-law securities claims, not those asserting only claims under the 1933 Act. Indeed, investors could not circumvent the PSLRA's safe-harbor provisions by filing 1933 Act claims in state court, because those provisions apply to all 1933 Act claims *regardless* of the forum in which they are brought. *See* 15 U.S.C. §§ 77z-2(a), 78u-5(a).

Third, Congress found that securities plaintiffs were bringing state-law securities actions to bypass the automatic discovery stay imposed by the PSLRA before a complaint has survived dismissal. *See* 144 Cong. Rec. S4789 (daily ed. May 13, 1998) (statement of co-sponsor Sen. Christopher J. Dodd). To prevent "fishing expedition" lawsuits, the PSLRA required courts to stay discovery pending a ruling on a motion to dismiss, absent exceptional circumstances. H.R. Conf. Rep. No. 104-369, at 37; *see* PSLRA §§ 101(a), (b), 109 Stat. 741, 747 (codified as amended at 15 U.S.C. §§ 77z-1(b), 78u-4(b)(3)). Post-PSLRA, however, Congress found that some plaintiffs were filing in state court "'to avoid federal discovery stays.'" S. Rep. No. 105-182, at 3 (quoting SEC Commissioner Joseph

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[15] *See also* 144 Cong. Rec. S4790 (daily ed. May 13, 1998) ("'If one or more states do not have similar safe harbors, then issuers face potential state court lawsuits and liability for actions that do not violate federal standards .... [T]he state with the most plaintiff-favorable rules for forward looking disclosures, rather than the Federal Government, is likely to set the standard to which corporations will conform.'") (statement of co-sponsor Sen. Christopher J. Dodd) (quoting Stanford Law School faculty member Michael A. Perino).

Grundfest and Stanford Law School faculty member Michael A. Perino).

As with the other concerns identified above, the discovery stay illustrates that Congress was not focused on 1933 Act claims asserted in state court. Investors were attempting to circumvent the PSLRA's discovery stay primarily by asserting state-law securities-fraud claims in state court – as such claims are not subject to the PSLRA's stay provision. *See* 15 U.S.C. § 77z-1(b)(1) (applying discovery stay to "any private action arising under this subchapter"). That provides no justification for stripping state courts of jurisdiction over 1933 Act claims, as state courts often stay discovery over such claims regardless – either under their own local rules[16] or under the PSLRA.[17]

Fourth, in enacting SLUSA, Congress feared that state legislation expanding liability could reverse the PSLRA's protections State by State. The fear stemmed from Proposition 211, a California ballot initiative voted on in November 1996, which "would have created broad private rights of action based on claims of fraud, many in conflict with provisions of the [PSLRA]." *Securities Litigation Abuses: Hearing Before the Subcomm. on Sec. of the S. Comm. of*

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[16] *See, e.g.*, Order Deeming Case Complex and Staying Discovery, *Kerley v. MobileIron, Inc.*, No. 15-CV-284706 (Cal. Super. Ct., Santa Clara Cty., Sept. 1, 2015); Order Setting Case Management Conference ¶ 2, *In re Ooma, Inc. Shareholder Litig.*, No. CIV536959 (Cal. Super. Ct., San Mateo Cty., Mar. 23, 2016).

[17] *See, e.g.*, Notice of Ruling, *Shores v. Cinergi Pictures Entm't Inc.*, No. BC149861 (Cal. Super. Ct., Los Angeles Cty., Sept. 11, 1996); Ruling on Motion To Stay Discovery Pending Decision on Demurrers, *Milano v. Auhill*, No. SB213476, 1996 WL 33398997 (Cal. Super. Ct., Santa Barbara Cty., Oct. 2, 1996).

Banking, Hous. & Urban Affairs, 105th Cong. 44 (July 24, 1997) ("*1997 Senate Hearing*") (statement of SEC Chairman Arthur Levitt). Even though the initiative failed, there were concerns that similar measures would be introduced in other States. *See id.* President Clinton wrote: "[T]he possibility of changes in one or more states' securities laws similar to those proposed in California's Proposition 211 suggests that there may be a need to reconsider the appropriate balance of federal and state roles in securities law. . . . [T]he proliferation of multiple and inconsistent standards could undermine national law." Letter from President Bill Clinton to Sen. Christopher J. Dodd (July 23, 1997), *reprinted in 1997 Senate Hearing* 161. These concerns – again, unrelated to 1933 Act claims – provided important legislative momentum for SLUSA's provisions precluding state-law securities claims.[18]

2. True, petitioners note (at 26-27) some other PSLRA provisions that do apply to 1933 Act claims filed in federal court (but not to those filed in state court) – *e.g.*, rules governing class representatives, settlement, and Rule 11 sanctions, 15 U.S.C. § 77z-1(a)(2), (3), (c). But SLUSA's legislative history contains no indication that Congress intended SLUSA to address the operation of those provisions. None of the congressional reports on SLUSA focuses on those provisions, and the floor debates contain no evidence that the 105th Congress was especially

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[18] *See 1997 Senate Hearing* 44 ("Concerns have been raised that measures similar to Proposition 211 may be introduced in other States. In fact, the trend has been to enact reforms that limit, not expand, private rights of action.") (statement of SEC Chairman Arthur Levitt).

concerned with state-court actions circumventing those specific parts of the PSLRA.

In fact, in the two years after Congress enacted the PSLRA, "[n]o case ha[d] made its way to a jury, relatively few motions to dismiss ha[d] been decided, and there ha[d] been even fewer settlements" under the PSLRA. *1997 Senate Hearing* 10 (statement of SEC Chairman Arthur Levitt). Thus, the impact of the PSLRA provisions that petitioners cite was unknown when Congress enacted SLUSA. As "a narrowly constructed bill," *1997 House Hearing* 39 (statement of co-sponsor Rep. Anna G. Eshoo), SLUSA was not likely intended to address the theoretical concerns that petitioners identify.

III. PETITIONERS' READING OF SLUSA'S LEGISLATIVE HISTORY IS UNPERSUASIVE

Petitioners extract various snippets from SLUSA's legislative history that they claim evince Congress's intent to divest state courts of jurisdiction over class actions asserting exclusively 1933 Act claims. *See, e.g.*, Pet. Br. 25-28. Petitioners' arguments are unpersuasive and fail to show that Congress intended SLUSA to upend the long history of state-court concurrent jurisdiction over such claims.

To begin with, petitioners' arguments from the legislative history face a steep hurdle. The 1933 Act's concurrent-jurisdiction provision accords with this Court's longstanding assumption that state courts are "equally competent bod[ies]" to decide cases under federal law. *Kircher v. Putnam Funds Tr.*, 547 U.S. 633, 646 (2006). Given the deeply rooted presumption in favor of concurrent jurisdiction, "[t]o give federal courts exclusive jurisdiction over a federal cause of action, Congress must . . .

affirmatively divest state courts of their presumptively concurrent jurisdiction." *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1990). Implied divestment of state-court jurisdiction is strongly disfavored, and piecemeal statements in legislative history are inadequate "to overcome the presumption of concurrent jurisdiction." *Id.* at 824-25.

SLUSA's legislative history contains no evidence that Congress intended to trample on the long-held tradition of state-court concurrent jurisdiction over all actions asserting only 1933 Act claims. Indeed, in the debate over SLUSA, there was no clear discussion at all of whether Congress should divest state courts of jurisdiction to hear any 1933 Act claims. In its section-by-section analysis, neither the Senate report nor the House report even mentioned the conforming amendments on which petitioners rely. *See* S. Rep. No. 105-182, at 8-9; H.R. Rep. No. 105-640, at 16-18. That is because Congress devoted its attention instead to the federal preemption of state securities *laws*, not the elimination of state-court *actions*. *See, e.g.*, 144 Cong. Rec. H10,785 (daily ed. Oct. 13, 1998) (statement of Rep. Diana DeGette opposing preemption); *id.* at S4794 (daily ed. May 13, 1998) (statement of Sen. Richard Bryan opposing preemption); *see also* Resp. Br. 28-30 (further addressing SLUSA's legislative history).

Despite the general lack of attention given to 1933 Act claims in SLUSA's legislative history, petitioners point (at 22-24) to certain statements from the legislative history referring to federal courts as "the exclusive venue" for most securities class-action lawsuits. But the majority of such statements contained critical qualifiers: they evinced Congress's understanding that SLUSA would shift *most* – but not *all* –

securities class actions into federal court.[19] For example, in President Clinton's signing statement that petitioners cite (at 23), President Clinton stated that, "[s]ince the uniform standards provided by [SLUSA] state that class actions *generally* can be brought only in Federal court, where they will be governed by Federal law, clarity on the Federal law to be applied is particularly important." Presidential Statement on Signing the Securities Litigation Uniform Standards Act of 1998, 34 Weekly Comp. Pres. Doc. 2247, 2248 (Nov. 3, 1998) ("SLUSA Signing Statement") (emphasis added).

The legislative history of the PSLRA and SLUSA demonstrates that such statements were made in reference to securities-fraud claims (brought under either the 1934 Act or state law), which accounted for the vast majority (if not all) of the so-called "strike" suits with which Congress was concerned. SLUSA's central focus – and the goal that petitioners' legislative-history quotations reflect – was to prevent plaintiffs from using such securities actions to circumvent the PSLRA.[20]

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[19] *See, e.g.*, H.R. Conf. Rep. No. 105-803, at 13, 15 (1998); 144 Cong. Rec. E1424 (daily ed. July 24, 1998) ("The measure before us . . . would *generally* proscribe bringing a private class action suit involving 50 or more parties except in Federal court.") (statement of Rep. Jane Harman) (emphasis added); *id.* at H10,776 (daily ed. Oct. 13, 1998) ("By making Federal courts the exclusive venue for *most* of the securities class action lawsuits, [SLUSA] imposes the standards of the [PSLRA] on all securities class action lawsuits, except those narrow instances specifically excluded by [SLUSA].") (statement of Rep. John Dingell) (emphasis added).

[20] *See The Securities Litigation Uniform Standards Act of 1997 – S. 1260: Hearing Before the Subcomm. on Sec. of the S. Comm. on Banking, Hous. & Urban Affairs*, 105th Cong. 35

Placed in that context, petitioners' interpretation of the legislative record falls apart. To be sure, the legislative history is replete with references to Congress's general intent to close the "loophole" in the PSLRA and to curb "abusive litigation" being brought in "State, rather than in Federal, court." Pet. Br. 21, 22. But it is conspicuously bare of congressional statements applying those general concerns to 1933 Act claims in particular. Most of the statements petitioners identify – such as Rep. Rick White's concern about suits "formerly brought in Federal court . . . now being brought in State court"[21] – are most naturally read to refer to state-law substitutes for 1934 Act claims (which traditionally were filed in federal court) rather than 1933 Act claims (over which state courts always have had concurrent jurisdiction). *Amici* are not aware of any such statement in SLUSA's legislative history advocating that *1933 Act litigation* specifically be moved to federal court.[22]

(Oct. 29, 1997) ("[W]hat we are talking about here is essentially 10(b)(5) litigation, and that is what Congress was focused on when it passed the [PSLRA].") (statement of Stanford Law School faculty member Michael A. Perino); *1997 Senate Hearing* 94 ("The most important step that Congress could take to fully implement its reforms would be to pass uniform standards legislation, ensuring that nationwide securities class actions replicating Federal 10b-5 lawsuits are brought and tried in Federal court.") (statement of Richard I. Miller).

[21] 144 Cong. Rec. H6057 (daily ed. July 21, 1998) (statement of Rep. Rick White), *quoted in* Pet. Br. 21-22.

[22] Nor does the legislative history support petitioners' view (at 29) that SLUSA stripped state courts of jurisdiction over class actions asserting exclusively 1933 Act claims – even those that do not involve nationally traded securities. With the enactment of SLUSA, Congress was concerned only with nationally traded securities. *See* SLUSA § 2(5), 112 Stat. 3227

The full context of President Clinton's signing statement reinforces that conclusion. That signing statement reflects an understanding that SLUSA was focused on state-law claims brought in state courts, not 1933 Act claims: the signing statement focused on issuers "not using the Federal safe harbor for forward-looking statements" and state-court actions "being used to achieve an 'end run' around the [PSLRA]'s stay of discovery." SLUSA Signing Statement, 34 Weekly Comp. Pres. Doc. at 2248. As explained above (at 14-16), those concerns are inapplicable to state-court actions that assert only 1933 Act claims.

In short, with the enactment of SLUSA, Congress assumed that the 65-year tradition of state-court concurrent jurisdiction over 1933 Act claims would continue. *See, e.g., 1997 House Hearing* 10-11 ("[SLUSA] would ensure that the reforms included in the Federal law are adhered to by State courts.") (statement of Sen. Greg Ganske); 144 Cong. Rec. H6058 (daily ed. July 21, 1998) ("Lawsuits brought . . . in State and Federal courts can go forward. They simply go forward under the reforms we passed both on the Federal law and now conforming that Federal law to the 50 States.") (statement of Rep. Billy Tauzin). Generalized references in the legislative history to the dangers of abusive state-court lawsuits

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(finding it "appropriate to enact national standards for securities class action lawsuits *involving nationally traded securities*") (emphasis added); S. Rep. No. 105-182, at 23 ("[SLUSA] will . . . creat[e] a national standard for class action suits involving nationally traded securities.") (additional views of Sen. Jack Reed); 144 Cong. Rec. H6057 (daily ed. July 21, 1998) ("[This bill] only applies to securities that are traded on the three national exchanges in our country.") (statement of Rep. Rick White).

do not demonstrate an intent to overhaul that longstanding tradition with respect to 1933 Act claims. On the contrary: Congress understood in enacting SLUSA that investors would continue to have the freedom to choose a state-court forum in bringing actions that asserted only 1933 Act claims – as they always had.

CONCLUSION

The judgment of the California Court of Appeal should be affirmed.

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IN THE

Supreme Court of the United States

CYAN, INC., ET AL.

Petitioner,

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, ET AL.

Respondents.

On Writ of Certiorari to the Court of Appeal for the State of California, First Appellate District

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici are prominent law professors whose scholarship and teaching focuses on the federal securities laws. This brief reflects the consensus of *amici* that Congress enacted the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") to prevent plaintiffs from evading the Private Securities Litigation Reform Act ("PSLRA") by filing class actions alleging claims under the Securities Act of 1933 (the "Securities Act") in state court. In other words, Congress intended for SLUSA to make federal court the exclusive forum for such actions. *Amici* believe that this Court should interpret SLUSA in a way that promotes, rather than undermines, that purpose. *Amici* therefore agree that this Court should, as Petitioners assert, recognize that SLUSA amended the jurisdictional provision of the Securities Act, Section 22(a), to divest state courts of jurisdiction over Securities Act

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[1] Pursuant to Rule 37.6 of the Rules of this Court, the undersigned hereby state that no counsel for Petitioner or Respondent authored any part of this brief, and no person other than *amicus curiae* or its counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a) of the Rules of this Court, letters of consent from all parties to the filing of this brief are on file or have been submitted to the Clerk of the Court.

class actions.[2] Each individual *amicus*, however, may not endorse every argument made in this brief.

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[2] *Amici* also agree that the alternate interpretation of SLUSA advanced by the United States in its *amicus curiae* brief would promote SLUSA's underlying purpose.

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SUMMARY OF ARGUMENT

In 1995, Congress enacted the PSLRA to protect issuers from *in terrorem* securities class action lawsuits. But, because most of the PSLRA's provisions only apply in federal court, plaintiffs quickly learned to avoid the PSLRA by filing securities class actions in state court. In response, Congress enacted SLUSA. SLUSA had two core purposes: to ensure that the protection against *in terrorem* lawsuits granted by the PSLRA applied to *all* class action lawsuits involving nationally traded securities, and, in the process, to subject those class actions to uniform standards. To accomplish these goals, Congress intended to make federal court the exclusive venue for class actions involving nationally traded securities.

Nevertheless, even after SLUSA, some courts, particularly in California, have continued to permit plaintiffs to file Securities Act class actions in state court. These decisions undermine all of SLUSA's purposes. By generating a flood of Securities Act litigation in California state court, these decisions have ensured that plaintiffs can continue to evade the PSLRA. And, in turn, these state proceedings lead to inconsistent interpretations of the Securities Act. As shown in Appendices A and B, Securities Act class actions in state and federal courts have markedly different dismissal rates. Between 2011 and 2016, federal courts dismissed 31% of cases filed with only Securities Act claims, whereas state courts

in California dismissed only *three of forty-seven*[3] such cases without leave to amend. Indeed, state courts have permitted cases to proceed even when the complaint is based on the *same factual scenario* that federal courts have repeatedly rejected as insufficient to sustain a Securities Act claim.

Finally, the different legal standards applied in state court lead to an increase in *in terrorem* settlements. The median settlement for Securities Act class actions filed in state court is almost *double* the median settlement for corresponding class actions filed in federal court. The decisions permitting Securities Act litigation to proceed in California state court therefore cannot be reconciled with SLUSA's purposes.

In its recent decision interpreting the Affordable Care Act, this Court recognized that "if at all possible, we must interpret the act in a way that is consistent with" Congress's goal in passing the ACA. *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015). This Court therefore rejected an interpretation that would "likely create the very 'death spirals' that Congress designed the Act to avoid." *Id.* at 2493. Here, SLUSA's purpose of preventing *in terrorem*

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[3] In one of those three cases, the court did not rule that the complaint failed to state a claim. Instead, the court determined that it could not exercise personal jurisdiction over the defendants. *See* Appendix B.

settlements and ensuring a uniform application of the securities laws can only be promoted by recognizing that—as Petitioners contend—SLUSA's jurisdictional amendments divested state courts of jurisdiction over Securities Act cases. *Amici* urge this Court to adopt that interpretation.

ARGUMENT

I. CONGRESS ENACTED SLUSA TO CLOSE THE JURISDICTIONAL LOOPHOLE CREATED BY THE PSLRA AND ENSURE A UNIFORM INTERPRETATION OF BOTH THE SECURITIES ACT AND SLUSA.

A. THE PSLRA OFFERED DEFENDANTS PROTECTIONS AGAINST ABUSIVE SUITS FILED IN FEDERAL COURT, BUT INADVERTENTLY SHIFTED SECURITIES ACTIONS TO STATE COURTS.

In 1995, Congress recognized that the Securities Act's "class-action device was being used to injure 'the entire U.S. economy.'" *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006) (quoting H.R. Rep. No. 104-369, at 31 (1995)). "[N]uisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and 'manipulation by class action lawyers of the clients whom they purportedly represent' had become rampant." *Id.* Congress was particularly concerned about plaintiffs who "abuse[d] the discovery process to impose costs so burdensome that it [was] often

economical for the victimized party to settle"—even if they had done nothing wrong. H.R. Rep. No. 104-369, at 31. "[T]hese abuses resulted in extortionate settlements, chilled any discussion of issuers' future prospects, and deterred qualified individuals from serving on boards of directors." *Dabit*, 547 U.S. at 81.

In response, Congress passed the PSLRA, which contains several provisions designed to protect issuers from strike suits and the costs of litigation. Most significantly, under the PSLRA, plaintiffs no longer have immediate access to discovery. Instead, "all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss." 15 U.S.C. § 77z-1(b). The PSLRA also targets meritless actions by requiring courts to include findings regarding compliance with Rule 11 and issue sanctions for any violation when every Securities Act class action concludes. 15 U.S.C. § 77z-1(c). In addition, to prevent "professional plaintiffs" from filing putative class actions every time a public company's stock loses value, plaintiffs must certify that they have reviewed the complaint, did not purchase the security at the direction of counsel or to participate in the suit, and must identify other Securities Act actions in which they were a plaintiff in the last three years. 15 U.S.C. § 77z-1(a)(2). Similarly, the PSLRA provides a process for the appointment of lead plaintiff, requiring the plaintiff who first files a lawsuit to publish notice of the suit so that other investors can apply to serve as lead

plaintiff. 15 U.S.C. § 77z-1(a)(3)(A). The PSLRA also creates a presumption that the applicant who has the "largest financial interest" in the action should be selected as lead plaintiff. 15 U.S.C. § 77z-1(a)(3)(B)(iii).

The PSLRA, however, contained a fatal flaw: almost none of the protections it provides apply to actions filed state court. Many provisions apply only to actions brought "pursuant to the Federal Rules of Civil Procedure," *i.e.*, brought in federal court. 15 U.S.C. § 77z-1(a). For instance, none of the PSLRA's provisions governing the appointment of a lead plaintiff apply in state court. *See id.* And, although the discovery stay does not have this express limitation, state courts usually do not stay discovery.[4] This is particularly important because the costs of discovery mount quickly and often can force defendants to settle a claim before a court is even able to rule on a motion to dismiss.

Moreover, state courts offer other advantages to plaintiffs intent on extracting a nuisance settlement. Plaintiffs in state court can avoid consolidation with federal actions asserting the same

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[4] *See* Douglas H. Flaum, et al., *Why Section 11 Class Actions Are Proliferating in California*, LAW360, April 27, 2015; *see also* Priya Cherian Huskins, *IPO Companies, Section 11 Suits and California State Court*, D&O Notebook, April 26, 2016, https://wsandco.com/do-notebook/ipo-companies-section-11-suits-california-state-court.

claims, leading to identical cases proceeding simultaneously in federal and state court. These competing actions may produce inconsistent decisions. As discussed in greater detail below, state courts have interpreted the Securities Act quite differently from their federal counterparts, and have refused to dismiss actions that would quickly be rejected in federal court.

Unsurprisingly, then, "[r]ather than face the obstacles set in their path," the PSLRA "prompted at least some members of the plaintiffs' bar to avoid the federal forum altogether." *Dabit*, 547 U.S. at 82. As one report submitted to Congress in 1997 described, after the passage of the PSLRA, plaintiffs frequently "resort[ed] to state court" or filed parallel litigation in "state and federal courts in an apparent effort to avoid the federal discovery stay or other provisions of the [PSLRA]." H.R. Rep. No. 105-803, at 14 (1998) (emphasis added); H.R. Rep. No. 105-640, at 10 (1998); *see also* S. Rep. No. 105-182, at 3 (1998). This shift was unprecedented—the SEC called it "potentially the most significant development in securities litigation" since the passage of the PSLRA. H.R. Rep. No. 105-803, at 14 (internal quotations and citation omitted).

B. CONGRESS ENACTED SLUSA TO CLOSE THE JURISDICTIONAL LOOPHOLE CREATED BY THE PSLRA.

Congress enacted SLUSA to end plaintiffs' new practice of filing class actions involving nationally traded securities in state court. As SLUSA's House and Senate managers explained, Congress was spurred to act by the "determin[ation] that since passage of the [PSLRA], plaintiffs' lawyers have sought to circumvent the Act's provisions by exploiting differences between Federal and State laws by filing frivolous and speculative lawsuits ***in State court***, where essentially none of the [PSLRA's] procedural or substantive protections against abusive suits are available." H.R. Rep. No. 105-803, at 14-15 (emphasis added). Indeed, SLUSA itself observes that the shift of "a number of securities class action lawsuits . . . ***from Federal to State courts***," had "prevented [the PSLRA] from fully achieving its objectives." Pub. L. No. 105-353, §§ 2(2)-(3), 112 stat. 3227 (emphasis added). "The purpose of [SLUSA was therefore] to prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation ***by filing suit in State, rather than in Federal, Court***." H.R. Rep. No. 105-803, at 13 (emphasis added).

Congress decided that "[t]he solution to this problem [was] to ***make Federal court the exclusive venue*** for most[5] securities fraud class action litigation involving nationally traded securities." *Id.* at 15 (emphases added). The bill's managers believed that SLUSA did just that—it "***ma[de] federal court the exclusive venue*** for most class action lawsuits," *id.* at 13 (emphasis added), thereby ensuring that "securities class action lawsuits involving nationally traded securities" would be subject to "national standards." Pub. L. No. 105-353, § 2(5), 112 Stat. 3227 (1998); *see also Knox v. Agria Corp.*, 613 F. Supp. 2d 419, 421 (S.D.N.Y. 2009).

During the legislative debates over SLUSA, individual members of Congress frequently reaffirmed the bill's core purpose. In statement after statement, both Democrats and Republicans explained that SLUSA would ensure that securities class actions involving nationally traded securities were litigated in federal court:

- Representative Harman: SLUSA would "generally proscribe bringing a private class action suit involving 50 or more parties except

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[5] The reason for references to "most" class actions is simple: SLUSA carved out from its broad preclusion provision a small set of class actions arising under state law. *See* 15 U.S.C. §§ 77p(d)(1)-(3). SLUSA has no such carveout for class actions asserting federal claims.

in Federal court." 144 Cong. Rec. E1424 (daily ed. July 23, 1998) (statement of Rep. Harman).

- Representative Lofgren: SLUSA "will finally slam the door on strike suits by establishing Federal court as the exclusive venue for securities class actions." 144 Cong. Rec. E1383 (daily ed. July 21, 1998) (statement of Rep. Lofgren).

- Representative Bliley: "The premise of this legislation is simple: lawsuits alleging violations that involve securities that are offered nationally belong in Federal court." 144 Cong. Rec. H11019-22, at H11020 (daily ed. Oct. 13, 1998) (statement of Rep. Bliley).

- Senator Kerry: SLUSA "mov[es] all class action securities lawsuits to federal court." 144 Cong. Rec. S4778-03, S4802 (daily ed. May 13, 1998) (statement of Sen. Kerry).

- Senator Reid: "State court litigation is a loophole around the PSLRA" and the failure to pass SLUSA "will cause a proliferation of litigation in state courts." *Id.* at S4799 (Sen. Reid).

- Senator Feinstein: "[S]uits traditionally filed in federal courts are now being placed in state courts" and SLUSA "will protect companies from this side-door tactic" by "establishing a uniform system for the movement of cases

from state to federal court." *Id.* at S4797 (Sen. Feinstein).

- Senator Grams: "[T]his Act simply requires that class action lawsuits against nationally traded securities be filed in Federal court." *Id.* at S4802 (Sen. Grams).

Other key actors expressed the same understanding. President Clinton explained that "the uniform standards provided by this legislation state that class actions ***generally can be brought only in Federal court***, where they will be governed by Federal law . . . ." Presidential Statement on Signing the Securities Litigation Uniform Standards Act of 1998, 34 WEEKLY COMP. PRES. DOC. 45, at 2248 (Nov. 3, 1998) (emphasis added).

Even an organization of plaintiffs' counsel, the National Association of Securities and Commercial Law, recognized that SLUSA "***would eliminate even Federal cases from being heard in State courts***," and the "States would be precluded from hearing actions under the 1933 Act . . . ." *Hearing Before the Subcomm. on Sec. of the Comm. on Banking, Hous., & Urban Affairs*, 105th Cong. 64 (Oct. 29, 1997) (prepared statement of Herbert E. Milstein) (emphasis added).

Congress spoke with one voice when it passed SLUSA. It enacted SLUSA to keep all securities fraud class actions in federal court, where they

would be subject to the PSLRA and uniform standards.

C. THIS COURT'S INTERPRETATION OF SLUSA SHOULD BE INFORMED BY THE CLEAR CONGRESSIONAL PURPOSE OF CLOSING THE JURISDICTIONAL LOOPHOLE.

In evaluating the competing interpretations of SLUSA advanced by the parties here, this Court should keep SLUSA's ultimate purpose of making federal court the "exclusive venue" for securities class actions in mind. This Court has refused to "interpret federal statutes to negate their own stated purposes." *New York State Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 419-420 (1973). Rather, as this Court recently held in its review of the Affordable Care Act, courts should (if possible) adopt the statutory reading that comports with the intent of the statute as a whole: "Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter." *King*, 135 S. Ct. at 2496; *see also id.* at 2493 (rejecting interpretation that would "likely create the very 'death spirals' that Congress designed the Act to avoid"); *see generally Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486, 492 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the

statute, and consulting any precedents or authorities that inform the analysis.").

As Congress recognized, SLUSA's core purposes of closing the jurisdictional loophole and promoting a uniform interpretation of the securities laws can only be advanced by making federal courts the exclusive venue for securities class actions. And, as Petitioners explain, Congress amended the jurisdictional provision of the Securities Act, Section 22(a), to do just that. Brief for Petitioners at 14-16, *Cyan v. Beaver County Employees Ret. Fund*, No. 15-1439 (U.S. August 28, 2017). SLUSA amended Section 22(a) to divest state courts of jurisdiction over "covered class actions," *i.e.*, all Securities Act class actions or non-class actions brought on behalf of more than 50 claimants. *See id.* at 7-8, 14-16. Congress's amendment to Section 22(a) therefore ensured that SLUSA achieved the result it set out to accomplish by making federal court the exclusive forum for Securities Act class actions.[6]

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[6] In an *amicus curiae* brief, the United States argued that SLUSA amended Section 16 of the Securities Act to permit the removal of Securities Act class actions to federal court. Brief for the United States as Amicus Curiae at 13-15, *Cyan v. Beaver County Employees Ret. Fund*, No. 15-1439 (U.S. May 23, 2017). Permitting defendants to remove Securities Act class actions would also promote SLUSA's purposes of closing the jurisdictional loophole and promoting uniformity by ensuring that Securities Act class actions can be litigated in federal court.

In contrast, Respondent's interpretation would frustrate SLUSA's purpose. According to Respondent, SLUSA precludes plaintiffs from filing class actions based on state law (and permits defendants to remove such claims to federal court), but did nothing to prevent plaintiffs from taking an alternate path around the PSLRA—filing federal securities class actions in state court. *See* Respondent's Opposition to Petitioner's Request for Writ of Certiorari at 3, *Cyan v. Beaver County Employees Ret. Fund*, No. 15-1439 (U.S. May 23, 2017). In other words, Respondent's interpretation preserves the very jurisdictional loophole Congress sought to eliminate.

Concluding that state courts retain jurisdiction over federal class actions would lead to the bizarre situation where class actions alleging only state claims or both state and federal claims may be removed to federal court, but those alleging only federal claims must remain in state court. *See Knox*, 613 F. Supp. 2d at 425. There is no reason Congress would leave such an obvious gap in an act designed to promote the uniform interpretation of the securities laws. *Cf. Sheridan v. United States*, 487 U.S. 392, 403 (1988) (rejecting interpretation of Federal Tort Claims Act that would require the "odd assumption" that government had duty to prevent negligent harm but not intentional harm).

Moreover, by allowing Securities Act class actions to proceed in state court, Respondent's interpretation undercuts Congress's goal of creating

"national standards for securities lawsuits involving nationally traded securities." Pub. L. No. 105-353, § 2(5), 112 stat. 3227 (1998). State court decisions at the trial court level, unlike federal courts, rarely result in published—or even readily available unpublished—opinions. As this Court has noted, an important objective of the securities laws is "to maintain public confidence in the marketplace," which is achieved in part through private enforcement of the securities laws. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345 (2005). The lack of publicly available decisions hinders the uniform application of the securities laws.[7]

State court decisions also undermine uniformity when they directly contradict federal precedent. State courts are not bound by federal court decisions, except for those of this Court.[8] Thus,

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[7] Hillel Y. Levin, *Making the Law: Unpublication in the District Courts*, 53 VILL. L. REV. 973, 989 (2008) ("[E]veryone who has empirically studied the issue has concluded that . . . the general unavailability of unpublished opinions potentially leads to a misconception of the law itself.").

[8] *See McLaughlin v. Walnut Properties, Inc.*, 119 Cal. App. 4th 293, 297 (Cal. Ct. App. 2004) ("Since we are construing a federal statute, we must apply and interpret federal law. Decisions of the United States Supreme Court are binding. Lower federal court decisions, including those of the Ninth Circuit Court of Appeal, are not. If federal precedent is either lacking or in conflict, we will independently determine federal law.").

if this Court adopts Respondent's view, each state will be a circuit unto itself, leading to a patchwork of legal standards for nationally traded securities.[9] This is particularly troubling because, while federal courts have addressed the issues presented in securities class actions since the Securities Act's enactment, most state courts have little or no familiarity with the federal securities laws. This lack of familiarity with the issues manifests itself in a mosaic of inconsistent rulings. *See* Section II, *infra*. Competing interpretations of the same statute create uncertainty, and, as this court recently observed, such uncertainty "can put defendants at added risk in conducting business going forward, causing destabilization in markets which react with sensitivity to these matters." *See California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2053 (2017).

Respondent's interpretation of SLUSA simply cannot be reconciled with SLUSA's purpose. Congress passed SLUSA to end the very practice at issue here—the filing of Securities Act class actions in state court. SLUSA can, and should, be read in a way that furthers that goal.

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[9] *See Unschuld v. Tri-S Sec. Corp.*, No. 1:06-CV-02931-JEC, 2007 WL 2729011 at *8-9 (N.D. Ga. Sept. 14, 2007).

II. THERE ARE SIGNIFICANT LEGAL AND ECONOMIC CONSEQUENCES WHEN PLAINTIFFS FILE SECURITIES ACT CLAIMS IN STATES SUCH AS CALIFORNIA.

The recent spate of Securities Act class actions filed in California state courts demonstrates the incompatibility of Respondent's interpretation with SLUSA's core purpose. Many state and federal courts in California have permitted plaintiffs to bring Securities Act class actions in state court. Plaintiffs quickly responded, and California is now the forum of choice for shareholders filing Securities Act class actions. And, because Defendants in California cannot rely on either the PSLRA or the federal courts' familiarity with the Securities Act, plaintiffs are able to extract generous settlements in these actions. In other words, in California, issuers are now confronted with ***exactly the same problems*** that prompted Congress to enact SLUSA in 1998.

In 2013, the federal district courts in California issued a series of decisions remanding Securities Act class actions to California state court under Respondent's proposed interpretation of SLUSA. *See Plymouth Cty. Ret. Sys. v. Model N, Inc.*, No. 14-CV-04516-WHO, 2015 WL 65110, at *3 (N.D. Cal. Jan. 5, 2015) ("Since 2013, however, every court in this district to address the issue has granted remand."). The result has been a flood of Securities Act class actions filed in California state court. In 2014, only five such cases were brought in California

state court. In 2015, fifteen cases were filed. In 2016, *eighteen* such cases were filed.[10]

Moreover, Plaintiffs are filing cases in California state court even where the Company is headquartered in another state and has almost no connection to California itself. For instance, in *Cervantes v. Dickerson*, the plaintiff alleged Securities Act claims based on the registration statements of Etsy, a Delaware corporation headquartered in New York. No. 1:15-cv-534768, Complaint ¶ 14 (San Mateo Sup. Ct. July 21, 2015). The Company's executive officers resided in New York, and the statements at issue were presumably drafted there. *See id.*, ¶¶ 15-16. The case had almost no connection to California. The only connection was that one of the Company's five directors lived in California, and the company and its underwriters had satellite offices in the state. *Id.*, ¶¶ 17, 21-22. Nevertheless, the plaintiffs brought their Securities Act claims in California state court, apparently because, like other plaintiffs, they believed that California state court is a more favorable forum for their Securities Act claims.

Plaintiffs are right. For the reasons discussed above, the cases filed in California state court have quite different outcomes than those filed in federal

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[10] Cornerstone Research, *Securities Class Action Filings*, 2017 Midyear Assessment at 12 (2017).

court. For instance, between 2011 and 2016, federal courts dismissed 31% of cases with only Securities Act claims.[11] *See* Appendix A. However, from 2011 to 2016, of the 47 such cases filed in California state courts, only *three* (or 6%) have been involuntarily dismissed. *See* Appendix B.

Indeed, California courts have decided cases differently from federal courts in parallel proceedings based on the *same allegedly misleading statements*. In 2016, different plaintiffs filed parallel state and federal Securities Act proceedings against Sunrun, a solar energy company. *Compare Pytel v. Sunrun, Inc.*, No. CIV538215, Consolidated Complaint ("State Complaint") (San Mateo Sup. Ct. Oct. 17, 2016) *with Greenberg v. Sunrun, Inc.*, No. 3:16-cv-2480-CRB, Consolidated Amended Complaint ("Federal Complaint") (N.D. Cal. Oct. 21, 2016). The two complaints challenged many of the same statements. Both complaints claimed that the registration statement accompanying Sunrun's IPO misled investors because (1) Sunrun did not disclose legislative and regulatory developments in Nevada relating to solar power, *compare* State Complaint ¶¶ 35-36 *with* Federal Complaint ¶ 81; (2) Sunrun made misleading statements about "predictable pricing," *compare* State Complaint ¶ 39 *with* Federal

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[11] This figure does not include cases remanded to state court, because any motion to dismiss in such cases is ultimately filed in state court. *See* Appendix A.

Complaint ¶ 86; and (3) Sunrun made misleading statements about customer concentration. *Compare* State Complaint ¶ 50(c) *with* Federal Complaint ¶ 84.

These similarities, however, did not lead to the same result. While the District Court for the Northern District of California dismissed the Federal Complaint, the Superior Court of San Mateo County allowed the State Complaint to proceed. *Compare Pytel v. Sunrun, Inc.*, No. CIV538215, Minute Order at 1-2 (Jan. 13, 2017) (overruling Sunrun defendants' demurrer) *with Greenberg v. Sunrun Inc.*, 233 F. Supp. 3d 764, 775 (N.D. Cal. 2017) (dismissing complaint with prejudice because Sunrun's statements were not misleading). Indeed, in his opinion, Judge Breyer of the Northern District of California explicitly noted that he "*respectfully disagree[d] with some parts of Judge Weiner's decision in the parallel state court litigation.*" *Greenberg*, 233 F. Supp. 3d at 775 n.5 (emphasis added). Thus, in addition to unnecessarily burdening both the parties and the courts, the parallel proceedings permitted by Respondent's interpretation of SLUSA have generated inconsistent interpretations of the same company's obligations under the Securities Act.

State courts have also failed to follow federal precedent even when presented with nearly identical situations. For example, in *In re Stac Electronics Securities Litigation*, 89 F.3d 1399 (9th Cir. 1996), the Ninth Circuit held that Stac Electronics did not

have a duty to disclose a different company's plans to investors because it could never know if the other company would follow through with those plans. *Id.* at 1407. In *Stac*, most of Stac's revenue came from the sales of a "data compression device which double[d] storage capacity in computers using Microsoft's MS-DOS." *Id.* at 1401. Stac repeatedly warned investors that its revenues could decline if Microsoft itself introduced its own, similar product. *See id.* at 1402. Nevertheless, the plaintiffs argued that Stac misled investors by failing to disclose that Microsoft had *actually* developed a competitor product that it planned to "introduc[e] . . . in its upcoming version of DOS." *Id.* at 1405. The Ninth Circuit rejected these allegations, explaining that Stac had no duty to disclose Microsoft's plans because "another company's plans cannot be known to a certainty" and "Stac could not have known whether Microsoft would truly [introduce the competitor product]." *Id.* at 1407.

In 2012, in a case presenting a virtually identical scenario, a California state court refused to follow the precedent set by *Stac*. According to the Complaint in *Robinson v. Audience*, most of Audience's revenue came from the sale of noise cancellation technology that Apple used in its iPhones. *Robinson v. Audience, Inc.*, No. 1:12-cv-232227, First Amended Complaint ¶¶ 29-30 (Santa Clara Sup. Ct. Sept. 13, 2012). Audience repeatedly warned its customers that Apple could develop its own noise cancellation technology internally, and

use its own technology to replace Audience's product in future iPhone models. *See Robinson v. Audience, Inc.*, No. 1:12-cv-232227, Defendants' Reply in Support of Demurrer to First Amended Complaint at 3 (Santa Clara Sup. Ct. June 28, 2013). Nevertheless, the plaintiffs argued that Audience misled investors by failing "to disclose that Apple had in fact already decided to develop its own technology to replace Audience's product in the iPhone 5." *Robinson v. Audience, Inc.*, No. 1:12-cv-232227, First Amended Complaint ¶ 42 (Santa Clara Sup. Ct. Sept. 13, 2012).

The two cases therefore contained the same factual scenario, the same theory of falsity, and the same legal claims. The only difference between *Stac* and *Audience* was the result. In *Audience*, the Santa Clara Superior Court ignored *Stac*'s conclusion that Audience had no duty to disclose Apple's plans, and instead held that "[t]he Audience Defendants' lack of actual knowledge is not dispositive since they may be liable under Section 11 for innocent or negligent material misstatements or omissions." *Robinson v. Audience, Inc.*, No. 1:12-cv-232227, slip op. at 7 (Santa Clara Sup. Ct. Sept. 3, 2013). Thus, by filing in state court, the *Audience* plaintiffs avoided not only the PSLRA, but controlling precedent that should have doomed their claims.

These differences between federal and state court can lead to larger settlements. Between 2011 and 2016, cases filed in federal court asserting only Securities Act claims had a median settlement

amount of $4.425 million. *See* Appendix D. In contrast, the median settlement amount for such cases filed in California state court since 2011 was $8.5 million. *See* Appendix C. This is *exactly* the outcome Congress sought to avoid when it passed SLUSA. Congress sought to prevent plaintiffs from taking advantage of the differences between state and federal court, not to allow that practice to continue.

In sum, following the adoption of Respondent's proposed interpretation of SLUSA by California courts, plaintiffs have flocked to California, and in the process, ensured that defendants cannot rely on either the federal courts' expertise or the PSLRA. Under such circumstances, Securities Act claims are dismissed much less frequently and Defendants often pay more to settle even nuisance suits. Congress enacted SLUSA to put an end to these very disparities. Accordingly, this Court's interpretation of SLUSA's jurisdictional provision should be consistent with Congress's intent to make federal courts the exclusive forum for securities class actions, thus ensuring the uniform application of the federal securities laws.

CONCLUSION

For all of the reasons set forth above, *amici* respectfully request that this Court reverse the decision of the Court of Appeal for the State of California, First Appellate District, and make federal courts the exclusive jurisdiction for federal securities class actions.

Respectfully submitted,

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SEPTEMBER 5, 2017

Appendix A

APPENDIX A

Case Outcomes for Federal Class Actions Filed from 2011-2016
Filings with Section 11 Claims and No Rule 10b-5 Claims[1]

	Filing Date	Docket	Case Name	Circuit	Court	Case Status
1.	2/7/2011	11-CV-02769	Dan Katz v. China Century Dragon Media, Inc. et al	9th	C.D. California	Settled
2.	3/3/2011	11-CV-01461	Jack Shrader, et al. v. FXCM Incorporated, et al.	2nd	S.D. New York	Dismissed - Voluntary
3.	3/11/2011	11-CV-00624	MHC Mutual Conversion Fund, L.P. , et al. v. United Western Bancorp, Inc., et al.	10th	D. Colorado	Dismissed - Involuntary
4.	4/1/2011	11-CV-02794	Robert Stanger v. China Electric Motor, Inc., et al.	9th	C.D. California	Settled
5.	4/1/2011	11-CV-02768	Michael Stern v. China Intelligent Lighting and Electronics, Inc., et al.	9th	C.D. California	Settled
6.	5/6/2011	11-CV-03936	Gary Redwen v. Sino Clean Energy Inc et al.	9th	C.D. California	Settled
7.	5/12/2011	11-CV-00520	Northumberland County Retirement System, et al. v. GMX Resources, Inc., et al.	10th	W.D. Oklahoma	Settled
8.	6/17/2011	11-CV-02919	Nancy Kowalski, et al. v. Apple REIT Ten, Inc., et al.	2nd	E.D. New York	Dismissed - Involuntary
9.	7/29/2011	11-CV-11359	Washtenaw County Employees' Retirement System v. The Princeton Review, Inc. et al.	1st	D. Massachusetts	Dismissed - Involuntary
10.	8/19/2011	11-CV-05831	Bhushan Athale, et al. v. SinoTech Energy Limited, et al.	2nd	S.D. New York	Settled[3]
11.	10/25/2011	11-CV-81184	Martin J Fuller, et al. v. Imperial Holdings, Inc, et al.	11th	S.D. Florida	Settled
12.	10/28/2011	11-CV-01033	Karsten Schuh, et al. v. HCA Holdings, Inc., et al.	6th	M.D. Tennessee	Settled
13.	10/28/2011	11-CV-07673	McKenna et al v. Smart Technologies, Inc. et al.	2nd	S.D. New York	Settled
14.	11/14/2011	11-CV-81270	Greenfield Childrens Partnership, et al. v. FriendFinder Networks, Inc., et al.	11th	S.D. Florida	Dismissed - Involuntary
15.	11/23/2011	11-CV-05669	Matthew Sandnas, et al. v. Pacific Biosciences of California, Inc., et al.	9th	N.D. California	Remanded to State Court
16.	11/28/2011	11-CV-08622	Barbara Blazer, et al. v. Apple REIT Nine, Inc., et al.	2nd	S.D. New York	Dismissed - Voluntary
17.	2/6/2012	12-CV-00373	Matthew A. Brady, et al. v. Kosmos Energy Ltd., et al.	5th	N.D. Texas	Settled
18.	5/23/2012	12-CV-04081; consolidated with MDL 1:12-md-02389-RWS	Brian Roffe Profit Sharing Plan, et al. v. Facebook, Inc., et al.	2nd	S.D. New York	Ongoing
19.	5/25/2012	12-CV-04191	David Schottenstein, et al. v. Credit Suisse AG, et al.	2nd	S.D. New York	Dismissed - Involuntary
20.	5/25/2012	12-CV-00054	Ming Yang, et al. v. Tibet Pharmaceuticals, Inc., et al.	3rd	D. Virgin Islands	Settled[4]
21.	6/20/2012	12-CV-04839	Todd Augenbaum, et al. v. Lone Pine Resources, Inc., et al.	2nd	S.D. New York	Dismissed - Involuntary
22.	6/29/2012	12-CV-05124	George Scott, et al. v. Whitacre, et al.	2nd	S.D. New York	Dismissed - Involuntary
23.	7/20/2012	12-CV-02196	Chaz Campton, et al. v. Ignite Restaurant Group, Inc., et al.	5th	S.D. Texas	Settled
24.	8/16/2012	12-CV-04377	Olivia Niitsoo, et al. v. Alpha Natural Resources, Inc., et al.	4th	S.D. West Virginia	Remanded to State Court
25.	10/12/2012	12-CV-81123	Francis Howard, et al. v. Chanticleer Holdings, Inc., et al.	11th	S.D. Florida	Settled
26.	11/2/2012	12-CV-05636	Michael Toth, et al. v. Envivio, Inc., et al.	9th	N.D. California	Remanded to State Court

Cases Not Remanded to State Court:

Status Summary	Counts	Percentage
Dismissed – Voluntary	5	9%
Dismissed - Involuntary	18	31%
Settled	24	41%
Ongoing	11	19%
Total	58	100%

Sources:
Cornerstone Research; Stanford Securities Litigation Analytics

Note:
[1] Other claims may or may not be present.
[2] The plaintiffs reached a settlement agreement with the primary defendants, and the court later dismissed the plaintiff's claims against the defendant company's accountants.
[3] The plaintiffs reached a settlement agreement with the primary defendants, although the case remains ongoing.
[4] On March 1, 2017, Plaintiffs appealed the district court's order dismissing their complaint with prejudice to the Second Circuit.
[5] On April 21, 2017, Defendants appealed the district court's order granting Plaintiffs' motion to remand to state court to the Ninth Circuit.

Appendix B

APPENDIX B

'33 Act Class Actions Filed in California State Courts from 2011-2016

	Filing Date	Case Name	Case No.	Case Status
1.	July 1, 2011	West Virginia Laborers' Trust Fund v. STEC, Inc.	Orange County 30-2011-00489022	Dismissed - Voluntary[1]
2.	Sept. 27, 2011	Harper v. Smart Technologies, Inc.	San Francisco County CGC-11-514673	Dismissed - Voluntary[2]
3.	Oct. 21, 2011	Young v. Pacific Biosciences of California, Inc.	San Mateo County CIV509210	Settled
4.	Mar. 13, 2012	Marcano v. Nye (Zeltiq Aesthetics, Inc.)	Alameda County RG12621290	Dismissed - Involuntary
5.	May 22, 2012	Lazar v. Facebook, Inc.	San Mateo County CIV514065, removed to federal court on June 21, 2012 N.D. Cal. 12-CV-03199 and transferred on Oct. 9, 2012 to S.D.N.Y 1:12-MD-02389-RWS	Removed to federal court
6.	Aug. 1, 2012	Reyes v. Zynga Inc.	San Francisco County CGC-12-522876	Dismissed - Voluntary[3]
7.	Sept. 13, 2012	Robinson v. Audience, Inc.	Santa Clara County 1-12-CV-232227	Settled
8.	Oct. 19, 2012	Toth v. Envivio, Inc.	San Mateo County CIV517481, consolidated on Nov. 22 2013 San Mateo County CIV517185	Settled
9.	July 10, 2013	Desmarais v. Johnson (CafePress Inc.)	San Mateo County CIV522744	Settled
10.	Apr. 1, 2014	Beaver County Employees Retirement Fund v. Cyan, Inc.	San Francisco County CGC-14-538355	Ongoing
11.	Apr. 3, 2014	Rajasekaran v. CytRx Corp.	Los Angeles County BC541426	Ongoing[4]
12.	June 20, 2014	In re FireEye, Inc. Securities Litigation	Santa Clara County 1-14-CV-266866	Settled
13.	July 1, 2014	Welch v. Pacific Coast Oil Trust	Los Angeles County BC560944, consolidated on Nov. 18, 2014 Los Angeles County BC550418	Settled
14.	Sept. 5, 2014	Plymouth County Retirement System v. Model N, Inc.	San Mateo County CIV530291	Settled

[1] This case was voluntarily dismissed due to resolution of a related securities class action in federal court in the Central District of California, which was settled on May 23, 2013. Decl. in Support of Plaintiff (Req. for Dismissal), *West Virginia Laborers' Trust Fund v. STEC, Inc.*, Case No. 30-2011-00489022 (Orange Cty. August 16, 2013).

[2] Plaintiffs voluntarily dismissed their claims after the final settlement of a related Section 11 case in federal court. Memorandum of Law in Support of Pl.'s Mot. for Voluntary Dismissal, Case No. CGC-11-514673 (San Francisco Cty. Super. Ct. Sept. 30, 2014).

[3] Plaintiff requested voluntary dismissal on the basis that Plaintiff no longer wished to participate in the suit individually, and purported class members were included within the class of a pending federal action. Pl.'s Unopposed Req. for Voluntary Dismissal of Action, *Reyes v. Zynga Inc.*, Case No. CGC-12-522876 (San Francisco Cty. Super. Ct. Feb. 4, 2015).

[4] This case was stayed pending resolution of a related federal action in which Plaintiff was an interested party and which settled on May 18, 2016. *Chen v. CytRx Corp., et al.*, Case No. 2:14-cv-01956-GHK-PJW (C.D. Cal. May 18, 2016). While the docket refers to the case being closed, there is not an official order dismissing the case, therefore, it has been listed as ongoing.

	Filing Date	Case Name	Case No.	Case Status
43.	Aug. 18, 2016	Jackie888, Inc. v. Tokai Pharmaceuticals, Inc.	San Francisco County CGC-16-553796	Ongoing[13]
44.	Sept. 1, 2016	Ramsay v. Pure Storage, Inc.	San Mateo County 16CIV01183	Ongoing
45.	Sept. 20, 2016	Jackie888, Inc. v. Rewalk Robotics Limited	San Mateo County 16CIV01454	Dismissed - Involuntary[14]
46.	Nov. 4, 2016	Hosey v. Costolo (Twitter, Inc.)	San Mateo County 16CIV02228	Ongoing
47.	Nov. 18, 2016	Book v. ProNai Therapeutics, Inc.	San Mateo County 16CIV02473	Ongoing

Sources:
Cornerstone Research; Stanford Securities Litigation Analytics

All Filings:

Status Summary	Counts	Percentage
Dismissed - Voluntary	4	9%
Dismissed - Involuntary	3	6%
Settled	15	32%
Removed to federal court	6	13%
Ongoing	19	40%
Total	47	100%

Cases Not Removed to Federal Court:

Status Summary	Counts	Percentage
Dismissed - Voluntary	4	10%
Dismissed - Involuntary	3	7%
Settled	15	37%
Ongoing	19	46%
Total	41	100%

[13] This case was stayed on February 27, 2017 on *forum non conveniens* grounds in favor of three related federal cases pending in the District of Massachusetts. Order Staying the Action, *Jackie888, Inc. v. Tokai Pharmaceuticals, Inc.*, et al. (San Francisco Cty. Feb. 27, 2017).

[14] The Court quashed service of summons on defendants on January 31, 2017 and dismissed the plaintiffs' complaint without prejudice. Order Quashing Service of Summons on Defs. and Dismissing Plfs. Complaints Without Prejudice, *Jackie888, Inc. v. Rewalk Robotics Ltd., et al.*, Case No. 16CIV01454 (San Mateo Cty. Super. Ct. Jan, 31, 2017).

APPENDIX C

Securities Act Class Actions Filed Between 2011 and 2016 Settled in California State Courts

	Settlement Year	Docket	Case Name	Settlement Amount
1.	2013	San Mateo County CIV509210	Young v. Pacific Biosciences of California, Inc.	$7,686,495
2.	2015	San Mateo County CIV517481, consolidated on Nov. 22 2013 San Mateo County CIV517185	Toth v. Envivio, Inc.	$8,500,000
3.	2015	San Mateo County CIV522744	Desmarais v. Johnson (CafePress Inc.)	$8,000,000
4.	2015	San Mateo County CIV530291	Plymouth County Retirement System v. Model N, Inc.	$8,550,000
5.	2015	Santa Clara County 1-12-CV-232227	Robinson v. Audience, Inc.	$6,050,000
6.	2016	San Mateo County CIV533203	Firerock Global Opportunity Fund LP v. Castlight Health, Inc.	$9,500,000
7.	2016	San Mateo County CIV534070	Hunter v. Aerohive Networks, Inc.	$5,750,000
8.	2016	Los Angeles County BC560944, consolidated on Nov. 18, 2014 Los Angeles County BC550418	Berliner v. Pacific Coast Oil Trust	$7,600,000
9.	2016	San Francisco County CGC-15-544770	Debotte v. King Digital Entertainment Plc	$18,500,000
10.	2016	San Mateo County CIV536313; consolidated on July 19, 2016 San Mateo County CIV536013	Kleiman v. Sientra, Inc.	$9,650,000[1]
11.	2017	Santa Clara County 1-15-CV-276207	City of Warren Police and Fire Retirement System v. A10 Networks, Inc.	$9,837,500
12.	2017	Santa Clara County 1-14-CV-266866	In re FireEye, Inc. Securities Litigation	$10,250,000
13.	2017	San Mateo County CIV533635, transferred on Nov. 6, 2015 to Santa Clara County 15-CV-287794	City of Warren Police and Fire Retirement System v. Revance Therapeutics, Inc.	$6,400,000
14.	2017	Santa Clara County 1-15-CV-284761, consolidated on Jan. 4, 2016 Santa Clara County 1-15-CV-284001	Steinberg v. MobileIron, Inc.	$7,500,000
15.	2017	San Mateo County CIV536488	Beaver County Employees Retirement Fund v. Avalanche Biotechnologies, Inc.	$13,000,000

Sources:
Cornerstone Research; Stanford Securities Litigation Analytics
All data current as of 8/2/2017

All Filings: Median Settlement Value $8,500,000

[1] The total settlement amount in this case was $10,900,000, however $1,250,000 of that amount was allocated to settlement of a parallel federal case under Section 10(b) of the Securities Exchange Act.

Appendix D

APPENDIX D

Securities Act Class Actions Filed Between 2011 and 2016 Settled in Federal Courts

	Settlement Year	Docket	Case Name	Settlement Amount
1.	2013	11-CV-07673	McKenna et al v. Smart Technologies, Inc. et al.	$15,250,000
2.	2013	11-CV-02769	Dan Katz v. China Century Dragon Media, Inc. et al	$843,333
3.	2013	11-CV-02794	Robert Stanger v. China Electric Motor, Inc., et al.	$3,778,000
4.	2013	11-CV-03936	Gary Redwen v. Sino Clean Energy Inc et al.	$2,000,000
5.	2013	11-CV-81184	Martin J Fuller, et al. v. Imperial Holdings, Inc, et al.	$13,600,000
6.	2013	11-CV-05831	Bhushan Athale, et al. v. SinoTech Energy Limited, et al.	$20,000,000
7.	2014	11-CV-00520	Northumberland County Retirement System, et al. v. GMX Resources, Inc., et al.	$2,700,000
8.	2014	12-CV-00373	Matthew A. Brady, et al. v. Kosmos Energy Ltd., et al.	$10,200,000
9.	2014	12-CV-81123	Francis Howard, et al. v. Chanticleer Holdings, Inc., et al.	$850,000
10.	2014	11-CV-02768	Michael Stern v. China Intelligent Lighting and Electronics, Inc., et al.	$633,950
11.	2014	12-CV-08557	Shirley Horn, et al. v. Hi-Crush Partners LP, et al.	$3,800,000
12.	2015	11-CV-01033	Karsten Schuh, et al. v. HCA Holdings, Inc., et al.	$215,000,000
13.	2015	12-CV-02196	Chaz Campton, et al. v. Ignite Restaurant Group, Inc., et al.	$1,800,000
14.	2015	13-CV-04921	Lewis Booth, et al. v. Strategic Realty Trust, Inc., et al.	$5,000,000
15.	2016	14-CV-03620	Ming Yang, et al. v. Tibet Pharmaceuticals, Inc., et al.	$16,075,000
16.	2016	13-CV-05486	Yun-Chung Tsai, et al. v. Violin Memory, Inc., et al.	$7,500,000
17.	2016	14-CV-03878	Karen J Desrocher, et al. v. Covisint Corporation, et al.	$8,000,000
18.	2016	14-CV-08020	Yedlowski, et al. v. Roka Bioscience, Inc., et al.	$3,275,000
19.	2016	15-CV-03813	Firerock Global Opportunity Fund LP, et al. v. Rubicon Technology, Inc., et al.	$2,500,000
20.	2016	14-CV-09357	Michael Freedman v. MOL Global, Inc. et al.	$8,500,000
21.	2016	16-CV-01941	Linde et al. v. Fifth Street Asset Management, Inc. et al.	$9,250,000
22.	2017	15-CV-03773	Errol Rudman, et al. v. CHC Group Ltd., et al.	$3,850,000
23.	2017	15-CV-08954	Enrico Vaccaro, et al. v. New Source Energy Partners L.P., et al.	$2,850,000
24.	2017	16-CV-02758	Loi Tran, et al. v. Third Avenue Management LLC, et al.	$14,250,000

Sources:
Cornerstone Research; Stanford Securities Litigation Analytics

All Filings: **Median Settlement Value** $4,425,000

No. 15-1439

In The
Supreme Court of the United States

CYAN, INC., ET AL.,

Petitioners,

vs.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, ET AL.,

Respondents.

On Writ Of Certiorari To The Court Of Appeal For The State Of California, First Appellate District

BRIEF OF AMICUS CURIAE LOS ANGELES COUNTY EMPLOYEES RETIREMENT ASSOCIATION IN SUPPORT OF RESPONDENTS

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Los Angeles County Employees Retirement Association (LACERA) is a California public pension fund that provides retirement benefits to employees of Los Angeles County and participating agencies. It is the largest county retirement system in the United States, currently administering pensions for more than 168,000 members, and managing net assets of $52.7 billion.

LACERA relies in large part on investment income to fund the benefits promised to its public employee members. As of August 31, 2017, 24.3% of LACERA's assets were invested in U.S. equities, and another 22% in foreign equities.

Given LACERA's status as a large institutional investor and the importance of its mission of funding public employees' benefits, LACERA is frequently a class member in securities class actions that seek to recover damages resulting from alleged wrongful acts or omissions of others. Through those efforts, since 2001 LACERA has recovered $68.7 million for its pension members through securities class actions in both

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[1] Petitioners and respondents have filed blanket consents to amicus briefs in this case. Pursuant to Supreme Court Rule 37.6, LACERA certifies that no party or counsel for a party authored any portion of this brief or made a monetary contribution intended to fund its preparation or submission. No person other than LACERA, its members, or its counsel have made such a monetary contribution.

state and federal courts. LACERA therefore is interested in how and where securities class action claims are litigated, and by supporting respondents as an amicus seeks to protect its ability to pursue such claims expeditiously and economically in an appropriate state court such as California.

SUMMARY OF ARGUMENT

Petitioners and their amici essentially argue that shareholders are flooding California's state courts with federal securities claims because state court procedures favor plaintiffs, and that the Securities Litigation Uniform Standards Act (SLUSA) therefore must be interpreted as stripping state courts of their longstanding concurrent jurisdiction over federal securities class action suits.

Petitioners' position rests on an incomplete picture of both SLUSA and the state courts. As explained in the Answering Brief, petitioners' position ignores SLUSA's actual language, which is not reasonably susceptible to petitioners' contention.[2] And as this amicus

[2] Congress knows how to limit state-court jurisdiction when that is what it intends. *See, e.g.*, the Securities Exchange Act of 1934, 15 U.S.C. § 78aa: "The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder."

brief will demonstrate, state courts are not the plaintiff-friendly free-for-all that petitioners and their amici describe. Rather, they are an efficient forum for wronged shareholders to recover their losses, in front of judges with ample experience handling complex civil cases.

1. Plaintiffs bring federal securities actions in state courts for legitimate reasons. They are not simply gaming the system, as petitioners and their amici assert. State courts process federal securities cases expeditiously and efficiently, with judges who specialize in complex case management and understand the applicable laws and procedures. Just as in federal courts, state courts can and do stay discovery until the pleadings are set where appropriate; sustain demurrers where appropriate; stay cases on forum non-conveniens grounds where there is a concurrent federal suit that truly has parallel claims; and allow for interlocutory appellate review of certification decisions. California state courts are prime examples of these similarities.

2. Despite amici portrayals of federal class actions flooding into state court, there are actually very few such suits – and for the category of cases highlighted in the amicus briefs supporting petitioners (class actions alleging claims under Section 11 of the 1933 Securities Act), the numbers are decreasing: There were just *four* such suits filed in California state courts in the first half of 2017.

3. There are advantages to defendants as well as plaintiffs when appropriate cases are tried in state courts rather than federal courts. Not all cases involve hundreds of millions of dollars nor warrant the time and expense of an often drawn-out federal court proceeding. State court cases may be more expeditiously determined to be meritorious or not and resolved accordingly. Settlements do not vary significantly between state and federal courts. The net result is that, where appropriate, plaintiffs may obtain a greater net recovery at no greater net cost to the defendants.

ARGUMENT

I. Other Than The Fact That State Courts Resolve Securities Class Actions More Expeditiously Than Federal Courts, There Is Little Practical Difference Between State And Federal Court Procedures.

A. California State Courts Offer An Expeditious Forum For Institutional Shareholders To Litigate Securities Claims Before Judges Experienced In Handling Complex Litigation.

Section 11 of the 1933 Securities Act creates liability for defendants who make material misstatements or omissions in a registration statement in connection with a public offering of securities. *See* 15 U.S.C. § 77k. Stock purchasers, including institutional investors like amicus LACERA, may pursue such suits

when they purchase stock in an initial public offering (IPO), only to see the share price plummet in the ensuing months or years. The suits are a way to return some of the lost value to the purchasers, who paid a price that was artificially inflated by the company's misstatements or omissions.

Stock purchasers wronged by the issuing company's misstatements and omissions have legitimate reasons for filing certain federal securities cases in state courts rather than federal courts. In particular, class action cases often move more expeditiously in state courts than in federal courts. Class actions in state courts are typically assigned to "complex" litigation departments, where the judges can devote their full attention to class actions, know class action law and procedure, and are able to move cases along. State court actions may thus be resolved more promptly and economically than analogous suits in federal court. That means lower attorney costs on both sides and, for meritorious cases, a greater net recovery for the plaintiff class without greater cost to the defendants. Those considerations are particularly important where, although the plaintiffs unquestionably have been damaged by the defendants' misstatements and omissions, the aggregate damage amounts are relatively low.

B. Similar Pleading Standards.

Among the parade of horribles that petitioners' amici bemoan is that state court pleading standards are supposedly looser than federal pleading standards,

allowing more state court cases to proceed past the pleading stage. This claim fails at several levels.

First, Section 11 claims need not allege fraud, and *even in federal court*, Section 11 claims not alleging fraud are not subject to the heightened pleading standards imposed by the Private Securities Litigation Reform Act. *See Panther Partners, Inc. v. Ikanos Commc'n, Inc.*, 681 F.3d 114, 120 (2d Cir. 2012). Rather, they are "'ordinary notice pleading case[s], subject only to the "short and plain statement" requirements of Federal Rule of Civil Procedure 8(a).'" *Id.* Moreover, as to Rule 8, the pleading standards imposed by this Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) cannot shed any light on what Congress intended when it enacted SLUSA, because *Twombly* and *Iqbal* were not decided until nearly a decade *after* SLUSA's 1998 enactment.

Second, California courts have applied federal pleading standards to Section 11 claims. *E.g.*, *Marcano v. Nye*, No. RG12 621290 at 5 (Cal. Super. Ct. Alameda Cnty. May 17, 2013) ("In the absence of published California decisions on the pleading standards for section 11 claims, the Court will rely on federal authorities"; sustaining demurrer without leave to amend).

Third, there is no reason to believe that California courts would permit sloppily-pleaded federal securities class actions to proceed past the pleading stage. Like federal courts, California courts are attuned to potential abuses of the class-action process. *E.g.*, *First Am. Title Ins. Co. v. Superior Court*, 146 Cal. App. 4th 1564,

1577 (2007) ("We cannot permit attorneys to make an 'end-run' around Proposition 64 [limiting certain class actions] by filing class actions in the name of private individuals who are not members of the classes they seek to represent and then using precertification discovery to obtain more appropriate plaintiffs"). Demurrers are sustained all the time.[3]

C. Similar Discovery Stays.

While the general rule in federal court securities class actions is to stay discovery once a motion to dismiss has been filed, the stay is not absolute. 15 U.S.C. § 78u-4(b)(3)(B). The statute explicitly permits discovery where particularized discovery is necessary to preserve evidence or to prevent undue prejudice. *Id.*; *see, e.g.*, *In re WorldCom, Inc. Sec. Litig.*, 234 F. Supp. 2d 301, 306 (S.D.N.Y. 2002) ("Where, as here, plaintiffs are not in any sense engaged in a fishing expedition or an

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[3] *E.g.*, *O'Donnell v. Coupons.com Inc.*, No. 1-15-CV-278399 (Cal. Super. Ct. Santa Clara Cnty. May 24, 2016) (sustaining demurrer to Rule 11 claims without leave to amend); *In re GoPro, Inc. S'holder Litig.*, No. CIV 537077 (Cal. Super. Ct. San Mateo Cnty. Dec. 16, 2016) (sustaining demurrer to some plaintiffs' Section 12 claim without leave to amend for lack of standing); *In re Pure Storage S'holder Litig.*, No. 16CIV01183 (Cal. Super. Ct. San Mateo Cnty. Aug. 31, 2017) (demurrer as to Section 11 claim sustained with leave to amend); *In re Aerohive Networks, Inc. S'holder Litig.*, No. CIV 534070 (Cal. Super. Ct. San Mateo Cnty. Dec. 10, 2015) (demurrer sustained with leave to amend); *Marcano v. Nye*, No. RG12 621290 (Cal. Super. Ct. Alameda Cnty. Nov. 9, 2012) (sustaining demurrer to Section 11 claim with leave to amend).

abusive strike suit and do not thereby act in contravention of the fundamental rationales underlying the PSLRA discovery stay, and where plaintiffs would be substantially prejudiced by the maintenance of the stay, defendants cannot call upon the ambiguous notion of 'particularized' discovery to bend Section 78u-4(b)(3)(B) to a purpose for which it was not intended").

Conversely, although there is no statutory ban on precertification discovery in California state courts, as a practical matter discovery is often stayed at the outset of federal securities class actions in state courts. As one court explained in refusing to allow plaintiff to take discovery and then attempt to amend a deficient cause of action: "The usual rule is: state a good faith claim first; then take discovery." *In re King Digital Entm't PLC S'holder Litig.*, No. CGC-15-544770 at 12-13 (Cal. Super. Ct. San Francisco Cnty. Dec. 18, 2015). California courts also routinely stay discovery when a case is deemed complex, which securities class actions generally are.[4]

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[4] *E.g.*, *Kerley v. Mobileiron, Inc.*, No. 1-15-CV-284706 at 5 (Cal. Super. Ct. Santa Clara Cnty. Sept. 1, 2015) ("Pending further order of this Court, the service of discovery and the obligation to respond to any outstanding discovery is stayed"); *City of Warren Police and Fire Ret. Sys. v. Revance Therapeutics, Inc.*, No. 1-15-CV-287794 (Cal. Super. Ct. Santa Clara Cnty. Nov. 24, 2015) ("Order Deeming Case Complex and Staying Discovery"); *City of Warren Police and Fire Ret. Sys. v. A10 Networks*, No. 1-15-CV-276207 (Cal. Super. Ct. Santa Clara Cnty. Feb. 9, 2015) (same); *IBEW Local Union 363 – Money Purchase Pension Plan v. Fireeye, Inc.*, No. 1-14-CV-266866 (Cal. Super. Ct. Santa Clara Cnty. July 1, 2014) (same).

D. Similar Interlocutory Appellate Review.

Amici supporting petitioners assert that the federal rules allow for immediate petitions of interlocutory class certification rulings, while state courts do not. Actually, the California and federal procedures are analogous on this point.

Federal procedure. Federal Rule of Civil Procedure 23(f) provides limited potential for interlocutory appellate review. A court of appeals *may* permit an appeal from an order *granting or denying* class-action certification upon prompt petition for permission to appeal. *Id.* Even if permission is granted, however, the appeal does not automatically stay district court proceedings. *Id.* Petitions for Rule 23(f) review are granted "sparingly" and only in "rare cases." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005).

Equivalent California procedure. The *granting* of class certification is subject to discretionary interlocutory appellate review, as in federal court. *Blue Chip Stamps v. Superior Court*, 18 Cal. 3d 381, 387 n.4, 556 P.2d 755, 759 n.4 (1976) (explaining that interlocutory review may be appropriate because "appeal from a final judgment is not a practical remedy"). Seeking such review does not require leave from the trial court. The *denial* of class certification is an appealable order under California law because the order is considered a "death knell" decision making it final for purposes of appeal. *Hicks v. Kaufman and Broad Home Corp.*, 89 Cal. App. 4th 908, 925 (2001).

E. Minimal Risk Of Duplicative State And Federal Proceedings.

There is minimal risk of parallel state and federal class actions with duplicative costs and inconsistent rulings. Under California law, like the law in all states, when a court finds that in the interest of substantial justice an action should be heard in another forum, "the court shall stay or dismiss the action in whole or in part on any conditions that may be just." Cal. Civ. Proc. Code § 410.30(a). Courts routinely do so. *E.g.*, *Nat'l Football League v. Fireman's Fund Ins. Co.*, 216 Cal. App. 4th 902, 940 (2013) (affirming stay of proceedings pending the outcome of parallel New York actions).

Data in the amicus briefs supporting petitioners bears this out. Amici indicate that between 2011 and 2016, there were 25 parallel 1933 Securities Act cases in California and federal courts. Brief of Alibaba Group et al. in Support of Petitioners, Appendix A. In at least 5 of those cases, the state court stayed the action in favor of the federal case. Brief of Amici Curiae Law Professors in Support of Petitioners, Appendix B. Plaintiffs voluntarily dismissed 3 others in light of the federal suits. *Id.*

When federal and state class actions proceed concurrently against a defendant, it is often because the actions are not truly parallel. For example, the defendant company may have made multiple misrepresentations, resulting in different suits based on each one. *Compare, e.g., Guo v. ZTO Express (Cayman) Inc.*, No.

17-CIV-03676 (Cal. Super. Ct. San Mateo Cnty.) (state action based on undisclosed subsidies to network partners) *with Nurlybayev v. ZTO Express (Cayman) Inc.*, No. 17-CV-06130 (S.D.N.Y.) (later-filed federal action based on inflated margins). Similarly, a company that made misrepresentations both in connection with its securities offering and in the open market may find itself sued by the purchasers it harmed by each category of misrepresentation. *Compare, e.g., Oklahoma Police Pension & Ret. Sys. v. Sientra, Inc.*, No. CIV 536013 (Cal. Super. Ct. San Mateo Cnty.) (state action based on secondary offering registration statement) *with Flynn v. Sientra, Inc.*, No. 15-CV-07548-SJO (C.D. Cal.) (federal action based on open market statements, not secondary offering). In each of these cases, the two suits may be against the same defendant, but they are not identical – different relevant facts, and different legal standards.

II. The Facts Belie Petitioners' Amici's Depiction Of Securities Class Actions Flooding Into California State Courts; The Flood Is But A Trickle.

Petitioners and their amici portray the filing of 1933 Securities Act class action claims in California state courts as a widespread, growing threat. They describe such cases as a "flood" and bemoan the "dramatic increase" in state court filings. They argue that to prevent this impending flood, this Court must interpret a federal statute to bar Securities Act class actions from being filed in state court.

Besides the fact that the statute says nothing of the sort, there is a threshold problem with petitioners' and amici's argument: The facts do not support it.

Petitioners and their amici focus on Section 11 class actions. They emphasize that there were 16 Section 11 class actions filed in California state courts in 2015, and 17 in 2016. Those numbers hardly constitute a "flood."[5]

Moreover, the numbers do not indicate that plaintiffs are filing Section 11 claims in state court *instead of in*, or to avoid, federal court. Rather, the state trajectory tracks the federal trajectory. Section 11 filings in federal court more than doubled between 2013 and 2015, mirroring the spike in IPOs in the preceding three years. NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review* at 8 (2017). IPO offerings slowed in 2015 and, in turn, so did Section 11 filings in federal court. *Id.* There was an even sharper decline in California courts in 2017: There were only *four* putative class actions alleging Section 11 claims filed in California state courts in the first half of 2017, on pace for a 56%

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[5] In fiscal year 2014-2015, the last reporting period available, over 6.8 million cases were filed in California state courts. Of these, 192,761 were "unlimited" civil cases, i.e., those in which, like the typical class action, the claim exceeded $25,000. Judicial Council of California, *2016 Court Statistics Report, Statewide Caseload Trends, 2005-2006 Through 2014-2015* at 69-70 (http://www.courts.ca.gov/documents/2016-Court-Statistics-Report.pdf). Sixteen out of 192,761 equals a mere .0083% of comparable California civil cases.

decrease from 2016. *See* Cornerstone Research, *Securities Class Action Filings – 2017 Midyear Assessment* at 4, 12, 14 (2017). Meanwhile, Section 11 putative class actions in *federal* court continued at their 2016 pace during the first half of 2017. *Id.* at 14.

The bottom line is that, contrary to petitioners' and amici's portrayal, Section 11 plaintiffs are not flocking to state courts, especially California state courts, at increasing rates. Section 11 filings mirror IPO offerings; as the number of IPOs has dropped, so has the number of Section 11 suits – and the drop has been sharper in state court than in federal court.

III. There Is No Evidence That Any Differences Between Federal And State Forums Impact The Amount For Which Cases Settle.

An amicus brief supporting petitioners asserts that the median settlement amount for Securities Act cases is lower in federal court than in California state courts, and that this demonstrates that plaintiffs are "taking advantage of the differences between state and federal court. . . ." Brief of Amici Curiae Law Professors in Support of Petitioners 24-25. But correlation is not the same as causation, and the brief does not identify any evidence that the differing midpoints are *caused* by any differences between the two forums.

Nor does the brief explain why the median settlement amount is a relevant metric. Focusing on the arithmetic *mean* – the average settlement amount – instead of the *median* – the settlement at the midpoint

of the total number of settlements – produces exactly the opposite result: The mean state court settlement was *lower* than the mean federal court settlement, by more than $6 million. Does that mean that the state courts are a more favorable forum for defendants than federal courts?

Furthermore, even if settlements in state court cases are, on average, greater than settlements in federal court cases, that does not prove that similar cases are treated dissimilarly in state and federal courts. The raw numbers say nothing about the relative merits of the cases that settled.

Finally, petitioners and their amici erroneously assume that Congress intended to deprive state courts of jurisdiction to hear federal securities class actions in order to limit the settlement value of those cases. There is no evidence of that, either. The only intent actually expressed by Congress was to allow for just compensation to individual investors when corporations mislead them about IPO's and mergers and acquisitions; to provide an effective means by which numerous individual investors can band together to obtain that compensation; and to promote the fundamental integrity and stability of our corporate economy.

CONCLUSION

In short, there are no significant differences between state and federal class action procedures that would compel the conclusion that, without expressly

saying so, Congress intended to strip state courts of all jurisdiction to hear federal securities class actions. LACERA urges the Court to so hold.

Respectfully submitted,

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v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, ET AL.,

Respondents.

On Writ of Certiorari to the Court of Appeal of California for the First Appellate District

BRIEF OF *AMICUS CURIAE* NEW YORK STOCK EXCHANGE LLC SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether state courts lack subject-matter jurisdiction over "covered class actions," 15 U.S.C. § 77v(a), that allege only claims under the Securities Act of 1933.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae New York Stock Exchange LLC ("NYSE"), along with its affiliated exchanges NYSE American LLC and NYSE Arca, Inc., together comprise the largest equity securities exchange group in the world. NYSE provides the leading global marketplace in which public companies are able to raise equity capital. It has been the listing venue for nine of the ten largest initial

[1] Petitioners' and Respondents' counsel of record consented to the filing of this brief by filing a blanket consent with the Clerk. In accordance with this Court's Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus* or their counsel, have made a monetary contribution to the preparation or submission of this brief.

public offerings ("IPOs") to date (including the single largest IPO) and all of the last 28 operating company IPOs that exceeded $700 million in size. See NYSE, *NYSE 2016 Year in Review* (2017).[2] NYSE-listed companies comprise 87% of the companies in the Dow Jones Industrial Average, 77% of the S&P 500, and 80% of the Fortune 100. *Ibid.* Due to its prominent and long-established position within the securities industry, NYSE has a unique interest in maintaining robust and competitive U.S. equity capital markets.

The Private Securities Litigation Reform Act of 1995 ("PSLRA") and Securities Litigation Uniform Standards Act of 1998 ("SLUSA") were designed to curtail abusive securities litigation that Congress deemed a threat to the attractiveness, competitiveness, and functionality of the U.S. equity capital markets. To enhance the effectiveness of the various reforms and safeguards included in those statutes, Congress dictated that specified types of securities class actions (including this one) would be litigated in *federal* courts under uniform *federal* standards.

Some lower courts, however, have created a loophole that allows plaintiffs to evade the PSLRA's uniform federal standards by filing class actions under the Securities Act of 1933 ("1933 Act") in state courts. Compounding this problem, identical lawsuits are often brought in state and federal courts by different plaintiffs asserting the same claims against the same defendants. Sometimes this happens simultaneously, but sometimes a state-court proceeding is filed even after federal proceedings have substantially progressed under the procedures prescribed by Congress.

The current litigation landscape risks a return to the era of unchecked abuses that preceded the reforms enacted through the PSLRA and SLUSA. Failure to en-

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[2] https://www.nyse.com/2016-year-in-review.

force these key reforms could dissuade companies from considering new or continued listings in the U.S., motivating them to turn to foreign equity capital markets or remain privately held. All participants in the U.S. equity capital markets lose in that situation. After all, robust U.S. equity capital markets offer the best access to funding in the world, while providing unmatched transparency and information to the investing public. Encouraging companies to list on U.S. equity exchanges thus helps both companies (by giving them access to capital) and investors (by expanding their investment opportunities). And the resulting efficient flow of capital to domestic markets—as well as the increased competition among companies for investors' capital—is a critical ingredient for continued U.S. economic growth.

NYSE believes these benefits are extremely important to maintaining the worldwide preeminence of U.S. equity capital markets. It thus has a distinct interest in advocating for judicial clarification of the intended scope of the fundamental reforms enacted by the PSLRA and SLUSA, such as channeling all covered class actions—including those under the 1933 Act—into federal courts to be litigated under uniform federal procedures.

SUMMARY OF ARGUMENT

Congress enacted the PSLRA to solve a specific problem—the rampant use of abusive litigation tactics in securities class actions. The securities plaintiffs' bar reacted by, among other things, filing lawsuits under the 1933 Act in state courts, where they exploited looser and (by definition) highly diverse procedures to once again extract a high cost with meritless litigation. These state-court actions were possible because, even after the PSLRA was enacted, the 1933 Act permitted claims brought under it to be filed in both state and federal courts and precluded removal of cases that were filed in state courts.

For these and other reasons, Congress passed SLUSA to address that precise problem by prohibiting state-court end-runs around the PSLRA's reforms. After SLUSA, securities plaintiffs should no longer have been able to file covered class actions asserting 1933 Act claims in state court or force the remand of such cases after removal by defendants. But confusion in the state and federal courts has resulted in the state-court loophole remaining open and the important promise of the PSLRA remaining unfulfilled.

The persistence of this problem hurts U.S. equity markets. The United States is the preeminent destination for raising equity capital, but the litigation risk that companies must endure to access capital through U.S. markets remains a deterrent to companies considering a U.S. listing. Companies have other options—including foreign capital markets or private financing—and those options may appear more attractive as perceived and actual risks of abusive securities litigation increase.

The resulting effect on capital markets hurts both investors and the economy. The U.S. equity capital markets deliver unparalleled transparency and standardization to investors, ensuring that they are armed with reliable information to guide their investment choices. The more companies that list on U.S. exchanges, the more investors benefit from these safeguards, allowing for informed investment decisions. The U.S. economy also benefits from maximal participation in U.S. equity capital markets, as those markets fulfill the critical role of directing the efficient flow of capital in a complex economic landscape.

Congress understood all of this when it passed the PSLRA and SLUSA. Indeed, protecting U.S. equity capital markets is one reason Congress enacted those reforms. The Court should give effect to Congressional in-

tent and enforce Congress' efforts to close the state-court loophole through the PSLRA's protections.

ARGUMENT

I. PERMITTING STATE-COURT LITIGATION OF COVERED CLASS ACTIONS UNDER THE 1933 ACT ERODES THE PSLRA'S PROTECTIONS AND THEREBY HARMS INVESTORS, COMPANIES, AND THE U.S. ECONOMY

SLUSA aimed to bolster the PSLRA's reforms by channeling all covered class actions into federal courts, where they would be litigated under the PSLRA's uniform federal procedures. Some courts nonetheless blessed attempts by plaintiffs' lawyers to file covered class actions under the 1933 Act in *state* courts. This court-created workaround has undermined the clear statutory framework Congress crafted to secure exclusive federal jurisdiction over 1933 Act covered class actions. The resulting quandary is not merely an esoteric jurisdictional question. Indeed, allowing 1933 Act covered class actions to proceed in state courts, where they evade the PSLRA's reforms, engenders the same type of abusive litigation the PSLRA and SLUSA sought to prohibit. And that has profound follow-on effects for investors, U.S. equity capital markets, and the U.S. economy writ large. Fortunately, the Court can forestall those harms by interpreting SLUSA as written, thus fulfilling the promise of Congress' landmark legal reforms.

A. The court-created loophole in SLUSA's grant of exclusive federal jurisdiction undermines the PSLRA's protections

1. *Courts' failure to enforce SLUSA has created an end-run around the PSLRA's protections*

In 1995, Congress enacted the PSLRA to combat the "rampant" rise in "nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and 'manipulation by class action lawyers of the clients whom

they purportedly represent.'" *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 81 (2006) (quoting H.R. Conf. Rep. No. 104-369, at 31 (1995)). That landmark legislation contains a number of reforms "to curb these perceived abuses." *Ibid.* Among other things, the PSLRA mandates an automatic stay of discovery while a motion to dismiss is pending, limits recovery of attorney's fees and expenses, sets criteria for selection of lead plaintiffs and their counsel, and vests control of litigation in the court-appointed lead plaintiffs whose compensation may not exceed that of the class members they are appointed to represent. See 15 U.S.C. § 77z-1; *Dabit*, 547 U.S. at 81. These reforms not only curtailed the worst of the incentives driving plaintiffs' counsel and empowered defendants to quickly dispose of meritless cases without the expense of protracted discovery, they created a well-defined system for ensuring that securities litigation would be controlled by the investors it is intended to benefit. In this way, the PSLRA targeted the most abusive aspects of securities litigation while guaranteeing that meritorious claims would still be heard.

The PSLRA proved to be a victim of its own success, however, because it had an "unintended consequence: It prompted * * * some members of the plaintiffs' bar to avoid the federal forum altogether * * * [and] bring[] class actions * * * in state court." *Dabit*, 547 U.S. at 82. That development undermined the core of the PSLRA, as many of its most important reforms—including the automatic stay of discovery and the mechanism for selecting lead plaintiffs and lead counsel—do not apply to actions brought in state court. See H.R. Conf. Rep. No. 105-803, at 14 (1998) (noting the trend of "plaintiffs resort[ing] to state court to avoid the new, more stringent requirements of [the PSLRA in] federal cases"). In addition, plaintiffs were able to fragment cases by bringing substantively identical lawsuits in both state and federal

court. So long as plaintiffs avoided pleading claims under the 1934 Act—which mandates exclusive federal jurisdiction—they could defeat attempts to consolidate the lawsuits in a single federal court and thwart the PSLRA's grant of control to lead plaintiffs selected according to its criteria.

To stem this "'shift[t] from Federal to State courts' and 'prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of' the [PSLRA], Congress enacted SLUSA." *Dabit*, 547 U.S. at 82. SLUSA employed a three-pronged approach to stop this flight to state court: It eliminated state-court jurisdiction over class actions alleging claims under the 1933 Act, granted federal courts removal jurisdiction over such cases, and precluded most class actions alleging state-law securities claims. 15 U.S.C. §§ 77v, 77p.[3]

That simple solution should have fixed the problem and restored uniform, federal standards to securities class actions. But multiple federal and state courts have failed to enforce SLUSA's jurisdictional modification with respect to 1933 Act covered class actions. They have instead permitted state courts to retain jurisdiction over those actions. See, *e.g.*, *Harper* v. *Smart Techs. Inc.*, No. C 11-5232 SBA, 2012 WL 12505217, at *1 (N.D. Cal. Sept. 28, 2012) (remanding based on finding of no removal jurisdiction under SLUSA); *Luther* v. *Countrywide Fin. Corp.*, 195 Cal. App. 4th 789, 797 (2011) (finding subject-matter jurisdiction despite SLUSA).

That judicial abrogation of SLUSA means that savvy plaintiffs' counsel can evade the PSLRA reforms by bringing covered class actions asserting 1933 Act claims

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[3] Significantly, neither the PSLRA nor SLUSA barred anyone from filing federal securities-law claims; rather, SLUSA simply changed *where* some such claims could be filed.

in state courts and defeating efforts to remove them to federal courts. Indeed, not only can plaintiffs avoid PSLRA procedures, they can escape the federal-court supervision of securities class actions that Congress intended. For example, even if a federal court has appointed lead plaintiffs and lead counsel pursuant to the PSLRA's guidelines, a different plaintiffs' counsel and lead plaintiffs could proceed independently by filing a substantively identical case in state court. This now-common scenario thwarts Congress' goal of centralizing complete control over a securities lawsuit in the lead plaintiffs and lead counsel appointed by federal courts under the PSLRA's requirements.

In a state forum, the PSLRA cannot prevent the abusive practices of "nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and 'manipulation by class action lawyers of the clients whom they purportedly represent.'" *Dabit*, 547 U.S. at 81 (quoting H.R. Conf. Rep. No. 104-369, at 31 (1995)). Plaintiffs in state courts can take advantage of more lenient state-court class-certification and discovery procedures to extort settlements in weak cases. Equally troubling, defendants now can be forced to litigate the same claims in both state and federal courts at the same time or, worse still, litigate claims in state court that have already been dismissed in federal court. When courts mistakenly hold that covered class actions filed in state court are not removable, they effectively prevent such actions from being consolidated with cases filed in federal courts. In these instances, the state-court litigation directly interferes with the litigation proceeding in federal court notwithstanding the PSLRA and SLUSA.

2. *Plaintiffs and their counsel exploit this loophole to subject listed companies to abusive and duplicative litigation*

The problems discussed above are not theoretical. Plaintiffs and their counsel have discovered this court-created loophole and exploited it to both circumvent the PSLRA's requirements and, in certain instances, directly evade federal-court orders issued pursuant to the PSLRA. California state courts have been ground zero for this trend. In 2011, the year that *Countrywide* opened up California state courts to 1933 Act class actions, only three 1933 Act class actions were filed in California. That number had quintupled by 2015 (in which plaintiffs filed 15 new 1933 Act class actions in California state courts) and further increased by 2016 (in which plaintiffs filed 18 more new such class actions in the state). Cornerstone Research, *Securities Class Actions Filings—2017 Midyear Assessment*, at 12 (2017).[4] If the Court does not reverse the decision below, this trend will accelerate and spread nationwide—and the PSLRA's protections will be reduced to mere paper promises.

An additional negative by-product is the explosion of instances in which defendants must simultaneously fight the same lawsuits in federal and state courts, but cannot centralize or consolidate them (as they could with 1934 Act claims by utilizing the federal transfer and multi-district litigation procedures). In 2011, there was only one instance of a parallel state and federal Section 11 filing. *Id.* at 14. That number shot up to six by 2016. *Ibid.* This trend, too, shows no signs of abating.

Such duplicative parallel litigation is costly and frustrating for companies and a waste of scarce judicial resources. Defendants must spend significantly more time

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[4] https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2017-Midyear-Assessment.pdf.

and expense to defend themselves in multiple fora, and multiple courts must expend efforts adjudicating the same claims. This not only guts Congress' attempt to consolidate securities class actions under one set of rules, it also harms shareholders, who ultimately foot the bill for defense costs in duplicative lawsuits. See Coffee, *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 Colum. L. Rev. 1534, 1536 (2006) ("[B]ecause the costs of securities class actions—both the settlement payments and the litigation expenses of both sides—fall largely on the defendant corporation, its shareholders ultimately bear these costs indirectly and often inequitably.").[5]

One early example of the problems created by this system is the parallel 1933 Act litigation against Smart Technologies and other defendants involved in its IPO. In January 2011, a putative 1933 Act class action was filed in federal court against those defendants. See *McKenna* v. *Smart Techs. Inc.*, 1:11-cv-7613-KBF, 2012 WL 1131935, at *7 (S.D.N.Y. Apr. 3, 2012). That litigation progressed for months under the PSLRA's procedures, and the court duly appointed a lead plaintiff and lead counsel to control the litigation. *Ibid.* The court-appointed lead plaintiff determined that the underwriters were not necessary parties, and they were dismissed from the litigation. See *McKenna*, 1:11-cv-7613-KBF, Docket Nos. 71 & 81.

Then, eight months into the case, another group of plaintiffs filed a copycat class action against the same defendants—including the underwriters—in California state court. See *Harper*, 2012 WL 12505217, at *1. The

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[5] Duplicative state-court litigation risks harming shareholders with meritorious claims, because settlements of such claims are often funded in whole or in part by directors and officers liability insurance policies, and all litigation costs erode the amounts available to pay claims.

defendants removed the case and sought a transfer to facilitate consolidation with the federal class action (*McKenna*). But the district court remanded the case, incorrectly holding that it lacked removal jurisdiction under SLUSA. *Id.* at *5.

Because that remand decision was not reviewable, the defendants were forced to defend claims arising out of the same IPO in two different fora and under two different sets of rules. That result was especially unfair to the underwriter defendants, as they were forced to face claims in state court that had been dismissed in federal court by the lead plaintiff appointed pursuant to the PSLRA.[6] Even more remarkably, when the court-appointed lead plaintiff settled the claims that survived dispositive motions in federal court, the state-court plaintiffs objected to that settlement and their counsel sought fees in federal court, claiming that the improper state-court action had materially contributed to the settlement. See *McKenna*, 1:11-cv-7613-KBF, Docket Nos. 185, 197, 201 at 23:5-49:9, & 203.

If the California federal court in *Harper* had properly enforced SLUSA, none of this would have happened. The procedures for transfer, consolidation, and multi-district litigation exist to avoid just this type of duplicative parallel litigation, with its attendant inequities and inefficiencies. But, much like the PSLRA's protections, their reach does not extend to state courts. Until SLUSA's promise of uniform, federal control over national securities litigation is fulfilled, defendants will continue to face the unwelcome prospect of parallel litigation

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[6] The defendants had also secured federal-court dismissal of various other claims by the time of the remand decision, but the state-court plaintiffs reasserted those claims as well. See *McKenna*, 2012 WL 1131935, at *13, 17-22 (granting defendants' motion to dismiss in part); *McKenna*, 1:11-cv-7613-KBF, Docket Nos. 109 & 201 at 36:21-23 (discussing assertion of dismissed claims in state-court action).

in multiple fora on the same claims. This Court has once before rejected a construction of SLUSA that "would give rise to wasteful, duplicative litigation." *Dabit*, 547 U.S. at 86. It should do the same here.

B. In NYSE's experience, weakening the PSLRA's protections lessens the attractiveness and strength of the U.S. capital markets

This end-run around the PSLRA's safeguards not only harms listed companies and their shareholders, but also acts as a brake on the growth of U.S. equity capital markets. Although U.S. equity capital markets offer unequalled advantages to companies seeking financing, they are not companies' only option. It is well-established that companies often remain private and accept the attendant financing and liquidity costs as the price for avoiding the litigation risks associated with accessing the U.S. public capital markets. See H.R. Rep. No. 104-50, at 19 (1995) ("Some companies may decide not to go public. In this way, they can avoid possible liability but only by incurring the costs associated with more expensive private financing.") (quoting Testimony of Professor Daniel R. Fischel before the House Subcomm. on Telecomm. and Fin., Hearings on H.R. 10, at 5-6 (Jan. 19, 1995)). Companies can also turn to foreign capital markets, which have different regulatory and litigation regimes and are outside the reach of key U.S. securities laws. See Ernst & Young, *IPO Insights: Comparing Global Stock Exchanges* (2009)[7] (discussing the competition among equity exchanges across the globe); *Morrison* v. *Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 267-268 (2010) ("[I]t is in our view only transactions in securities listed on domestic exchanges, and domestic transactions

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[7] http://www.ey.com/Publication/vwLUAssets/IPO_Insights:_Comparing_global_stock_exchanges/$FILE/IPO_comparingglobalstockexchanges.pdf.

in other securities, to which § 10(b) applies. * * * The same focus on domestic transactions is evident in the Securities Act of 1933 * * * ."); Brodsky & Adamski, Law of Corporate Officers and Directors: Rights, Duties and Liabilities, § 12:4. Extraterritorial reach (2016) ("Although *Morrison* involved only 1934 Act claims, courts have held that *Morrison* also applies to claims under the Securities Act of 1933.").

These risks to the continued prosperity of U.S. equity capital markets motivated the passage of the PSLRA and remain relevant today. See H.R. Rep. No. 104-50, at 20 (1995) ("Fear of litigation keeps companies out of the capital markets."). Indeed, "international observers increasingly cite the U.S. legal and regulatory environment as a critical factor discouraging companies and other market participants from accessing the U.S. markets." Commission on the Regulation of U.S. Capital Markets in the 21st Century, Report and Recommendations 30 (2007).[8]

The failure to apply SLUSA as written has inflated the litigation risk factor for those considering accessing the U.S. capital markets. NYSE staff who interact with companies considering whether to list on NYSE (or a competitor U.S. exchange) are intimately familiar with these concerns. They report that, even after SLUSA was enacted, the burdens of abusive shareholder litigation remain a substantial consideration for companies evaluating whether to list their securities on a U.S. exchange. This concern is not limited to domestic companies; it also applies prominently to foreign companies, many of which have decided not to list in the U.S. after expressing these concerns.

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[8] https://www.uschamber.com/sites/default/files/legacy/reports/0703capmarkets_full.pdf.

Congress set out to "deter or at least quickly dispose of those suits whose nuisance value outweighs their merits," *Dabit*, 547 U.S. at 83, thus aiding investors and incentivizing prospective listing companies to enter U.S. equity markets. But some courts' failure to properly apply SLUSA has hampered Congress' efforts and contributed to the United States' lingering reputation for abusive securities litigation. That has caused—and will continue to cause—a negative impact on the global competitiveness of the U.S. equity capital markets.

C. Abusive litigation harms investors, companies, and the U.S. economy

The only people who potentially benefit from the current state of affairs are plaintiffs with weak cases and their counsel, who typically are unlikely to secure appointment as lead plaintiffs and lead counsel under the PSLRA's requirements.

Everyone else loses. Plaintiffs with meritorious cases are no worse off under the PSLRA's safeguards, which merely promote proper and efficient litigation of securities class actions. As long as plaintiffs' claims are legitimate, they have nothing to fear from operating under the PSLRA's uniform, federal procedures.[9]

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[9] An express purpose of the PSLRA was to discourage the filing of weaker claims. One way to assess achievement of that goal is by examining settlement trends since 1995. Average settlement values of securities class actions increased after the PSLRA was enacted, which suggests that overall fewer weaker claims are being filed than before the PSLRA was enacted. See Buckberg et al, *Recent Trends in Shareholder Class Action Litigation: Bear Market Cases Bring Big Settlements* (NERA Economic Consulting Feb. 2005); Buckberg et al., *Recent Trends in Securities Class Action Litigation: 2003 Update* (NERA Economic Consulting Feb. 2004); Stanford Law School, Securities Class Action Clearinghouse, *Federal Securities Class Action Cases Filed and Defendant Market Cap Losses Surge in 2001* (Mar. 15, 2002); Cornerstone Research, *Securities Class Action Case Filings—2004: A Year in Review* (2005); Cornerstone Re-

Companies listed on a U.S. exchange are particularly harmed under the current regime. Listed companies that placed their faith in the U.S. equity capital markets are penalized for that choice by increased exposure to abusive litigation in unpredictable, multiple fora. Companies that opt to avoid a U.S. listing may escape the litigation risk, but must seek capital in foreign markets or through more expensive private sources of capital.

Investors are harmed as well. U.S. equity capital markets offer significant advantages to investors. The rules that govern those markets ensure an unmatched level of transparency and standardization in corporate reporting, structure, and operation. See Stier, National Bureau of Economic Advisors, *What Makes Foreign Firms Attractive to U.S. Investors?* (2007)[10] (observing that "U.S. exchange[s] * * * require[] more rigorous accounting and other mandated disclosures" than foreign markets).

The 1934 Act, for example, prohibits the SEC from registering an exchange unless

> [t]he rules of the exchange are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove imped-

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search, *Securities Class Action Case Filings—2003: A Year in Review* (2004); Cornerstone Research, *Securities Class Action Case Filings—2002: A Year in Review* (2003); Cornerstone Research, *Securities Class Action Case Filings—2001: A Year in Review* (2002); Simmons & Ryan, *Post-Reform Act Securities Case Settlements—Cases Reported Through December 2002* (2003); Simmons & Ryan, *Post-Reform Act Securities Lawsuits—Settlements Reported Through December 2003* (2004).

[10] http://www.nber.org/digest/apr07/w12500.html.

> iments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest * * * .

15 U.S.C. § 78f(b)(5).

The NYSE Listed Company Manual[11] contains many SEC-approved rules that advance those pro-investor purposes. Section 303A.01, for example, requires listed companies to have a majority of independent directors in order to "increase the quality of board oversight and lessen the possibility of damaging conflicts of interest." Similarly, Section 303A.10 provides that "[l]isted companies must adopt and disclose a code of business conduct and ethics for directors, officers and employees, and promptly disclose any waivers of the code for directors or executive officers." And Section 312.03 requires shareholder approval for issuing securities in most circumstances.

Investors benefit from the transparency and good business practices these rules foster. Investors are empowered to make informed investment decisions, based on standardized rules and disclosure requirements, about where to direct their capital, which encourages investment capital to flow to its highest and best uses. NYSE believes these advantages are maximized when companies choose to list on U.S. exchanges.

By contrast, the broader U.S. economy suffers when abusive securities litigation is allowed to flourish in state courts. The enormous size of the capital-market industry, measured by the amount of capital raised and number of people employed, is only part of the picture. The real strength of the U.S. equity capital markets is their ability to efficiently direct the flow of capital in a highly complex economy. The same transparency and standard-

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[11] http://wallstreet.cch.com/LCM/.

ization that benefits investors enables the U.S. equity capital markets to optimally perform this crucial role. The fewer companies that choose to publicly list, however, the less efficient this capital-directing system becomes, because it will contain less overall information about the companies that make up the economy. Moreover, because of the impediments to investing in non-listed companies (including the relative lesser transparency of their operations), inefficiencies in the flow of capital result when companies forego public listing. In sum, any disincentive for a company to list on the U.S. equity capital markets reduces the efficiency of the capital-directing mechanism that forms a central part of a healthy U.S. economy. Although NYSE acknowledges the importance of affording legal remedies to parties with meritorious claims, the abusive, duplicative litigation targeted by the PSLRA and SLUSA brings only economic harm with no countervailing benefits.

II. The Court Should Address SLUSA's Removal Provision To Ensure The Efficacy Of Its Ruling

This case most directly presents the question of whether state courts may exercise jurisdiction over 1933 Act covered class actions. That framing is an artifact of the somewhat unusual procedural posture of this case, where the defendants moved to dismiss on jurisdictional grounds rather than removing the case to federal court. See Pet. App. 1a-6a.

Although the state-court jurisdictional question is important, its resolution would not definitively resolve the split among the lower federal courts. To do that, the Court must also decide the closely related issue of whether SLUSA grants federal courts removal jurisdiction over covered class actions under the 1933 Act. That is the stumbling block in many of these cases, including the Smart Technologies litigation discussed earlier. The

Court should therefore address the removal-jurisdiction question to ensure the efficacy of its ruling.

The need for this guidance would be especially acute if the Court were to adopt the position of the United States and hold that state courts may exercise jurisdiction over 1933 Act class actions. If the Court were to follow that path, it should likewise accept the United States' advice to reach the removal question and confirm that 1933 Act class actions are indeed removable under SLUSA. Remaining silent on the issue would risk the indefinite reign of abusive tactics and parallel litigation in securities class actions. Because orders granting remand are generally unappealable, see *Kircher* v. *Putnam Funds Tr.*, 547 U.S. 633, 648 (2006), the Court should take this opportunity to decide the removal question. That will allow the lower "courts [to] benefit from straightforward [jurisdictional] rules under which they can readily assure themselves of their power to hear a case." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010).

There are no obstacles to the Court addressing the removal question here. As both Petitioners (at 16-20) and the United States (Petition-Stage Br. 13-17) explain in detail, the answers to the state-court jurisdiction and removal-jurisdiction questions are inextricably intertwined under SLUSA. Accordingly, even if the Court were to reject Petitioners' position as to state-court jurisdiction, the Court should address the removal question as part of interpreting the relevant SLUSA provisions in their statutory context. See *Richlin Sec. Serv. Co.* v. *Chertoff*, 553 U.S. 571, 579 n.4 (2008) ("Since the question presented cannot genuinely be answered without addressing the subsidiary question, we have no difficulty concluding that the latter question is 'fairly included' within the former."); *Dolan* v. *U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering

the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."). NYSE urges the Court to resolve the removal question and eliminate the legal instability that could otherwise plague litigants and market participants alike.

CONCLUSION

NYSE respectfully requests that the judgment of the Court of Appeal be reversed.

Respectfully submitted.

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RECORD AND BRIEFS

OCT 23

No. 15-1439

IN THE

Supreme Court of the United States

CYAN, INC., *et al.*,
Petitioners,

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, *et al.*,
Respondents.

On Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a consumer advocacy organization with members and supporters nationwide. Since its founding in 1971, Public Citizen has appeared before Congress, administrative agencies, and courts on a wide range of issues and worked for enactment and enforcement of laws protecting consumers, workers, and the public.

Public Citizen has a longstanding interest in the proper construction of statutory provisions defining and limiting the jurisdiction of the federal courts. The resolution of such issues often has significant impacts on the efficacy of statutory and common-law remedies under both state and federal law, as well as on the allocation of power in our federal system and the proper implementation of congressional intent. Public Citizen frequently appears as an amicus curiae before this Court in cases involving important issues of federal jurisdiction, including questions of removal jurisdiction and jurisdictional issues under the Securities Act of 1933, the Securities Exchange Act, and the Securities Litigation Uniform Standards Act of 1998 (SLUSA).[2]

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[1] Pursuant to Rule 37.6 of this Court, amicus curiae states that this brief was not written in whole or in part by counsel for a party and that no one other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from both parties consenting to all amicus briefs are on file with the Clerk.

[2] *See, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562 (2016); *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014); *Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142 (2007); *see also Kircher v. Putnam Funds Trust*, 547 U.S. 633 (2006) (Public Citizen attorneys as counsel for amici law professors in SLUSA case).

SUMMARY OF ARGUMENT

The question presented in this case is whether SLUSA deprived state courts of their long-standing concurrent subject matter jurisdiction over claims raised under the Securities Act of 1933 ("1933 Act"). As respondents' brief explains, the answer to that question is no.

In encouraging this Court to grant certiorari, the federal government agreed that state courts retain concurrent jurisdiction, but also introduced an issue not raised by the parties or addressed by the court of appeals below: whether section 16(c) of SLUSA, 15 U.S.C. § 77p(c), amended the 1933 Act's longstanding anti-removal provision to create removal jurisdiction not only for class actions that assert state-law claims precluded by SLUSA, but also for class actions filed in state court based solely on the 1933 Act.

The Court should decline to reach this argument, which has now also been addressed by the parties and several of petitioners' amici, because it is not necessary to resolve the question presented. To the extent it considers the argument, however, the Court need look no further to reject it than the plain language of the statute, as consistently interpreted by this Court's decision in *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 646 (2006), and seven courts of appeals. In *Kircher*, eight Justices of this Court agreed that under a "straightforward reading" of section 77p(c), the "removal and jurisdiction to deal with removed cases is limited to those precluded by the terms of subsection

(b)." *Id.* at 643.[3] No other reading is consistent with the text, and no amendment of the text is necessary to honor Congress's intent.

Section 77p(c) allows removal of class actions only "as set forth in subsection (b)." Subsection (b) of section 77p, in turn, applies only to certain class actions that include claims brought under state or local law. Therefore, section 77p(c) allows removal only of class actions that include claims brought under state or local law. This "straightforward reading," *Kircher*, 547 U.S. at 643, is consistent with the expressed purpose of the SLUSA amendment to the 1933 Act's anti-removal provision: to allow defendants to choose the forum that will determine whether state law class claims are precluded under section 77p(b). Nothing in the legislative history indicates that Congress intended to otherwise modify the long-standing bar on removal of 1933 Act claims, and the Court should not presume such an intention.

In short, if the Court concludes that class actions containing only claims under the 1933 Act are not precluded by section 77p(b), they are also not removable under 77p(c).

---

[3] Although Justice Scalia only joined part of the Court's opinion, his disagreement with this part of the opinion was based on reviewability, not the merits. 547 U.S. at 648-49 (Scalia, J., concurring).

ARGUMENT

I. The Court should not use this case as a vehicle to interpret a removal provision not at issue.

In response to this Court's invitation for the views of the Acting Solicitor General, the government espoused a position advanced by neither party. As to the actual question presented by petitioners, the government agreed with the California Court of Appeal and respondents that 15 U.S.C. § 77v(a), as amended by SLUSA, does not deprive state courts of their longstanding concurrent jurisdiction over actions brought solely under the 1933 Act. *See* U.S. CVSG Br. at 6-12. Departing from both a textual analysis and the positions advanced by the parties, however, the government also argued that, to harmonize the language of section 77v(a) with the policy goals of SLUSA, the Court should construe SLUSA, 15 U.S.C. § 77p(c), as allowing removal of class actions that allege only 1933 Act claims.

This atextual argument was neither raised nor resolved below. Indeed, respondents never attempted to remove this action and long ago waived any opportunity to remove: They were served on April 9, 2014, and had thirty days to remove the action pursuant to 28 U.S.C. § 1446(b). Rather than doing so, they elected to file numerous motions and litigate the merits in state court. The motion for judgment on the pleadings that raised the concurrent jurisdiction issue that is actually presented by petitioners was not filed until fourteen months after service and even then did not argue that the case was or would have been removable. Rather, petitioners expressly argued in the lower courts that section 77p(c) did *not* provide a basis for

removal in this case.[4] Thus, this case does not present the question whether a federal court would possess removal jurisdiction.

Moreover, there are no "compelling reasons" for this Court to review the question of removability of class actions raising only 1933 Act claims. *See* Rule 10. The courts of appeals that have addressed the issue are unanimous in rejecting the government's position and holding that the universe of actions removable pursuant to section 77p(c) is coextensive with the universe of actions with claims precluded by 77p(b).[5] And

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[4] *See, e.g.*, Memorandum of Points and Authorities in Support of Cyan Defendants' Motion for Judgment on the Pleadings for Lack of Subject Matter Jurisdiction 10-11 (filed Aug. 25, 2015); Cyan Defendants' Reply in Support of Their Motion for Judgment on the Pleadings for Lack of Subject Matter Jurisdiction 1-2 (filed Oct. 16, 2015).

[5] *See, e.g.*, *Hidalgo-Velez v. San Juan Asset Mgmt., Inc.*, 758 F.3d 98, 103 (1st Cir. 2014) ("These symbiotic provisions are mirror images of each other: any action that is properly removable under the removal provision is per se precluded under the preclusion provision and, conversely, any action not so precluded is not removable."); *Campbell v. Am. Int'l Grp., Inc.*, 760 F.3d 62, 64 (D.C. Cir. 2014) ("Removal under subsection (c) is for a specific purpose: when a case is removed to federal district court under that provision, the court's jurisdiction is confined to examining whether the action in fact falls within subsection (b)'s scope of preclusion."); *Madden v. Cowen & Co.*, 576 F.3d 957, 965 (9th Cir. 2009) ("[A]ny suit removable under SLUSA's removal provision, § 77p(c), is precluded under SLUSA's preclusion provision, § 77p(b), and any suit not precluded is not removable."); *Appert v. Morgan Stanley Dean Witter, Inc.*, 673 F.3d 609, 615-16 (7th Cir. 2012) (any suits "properly removed under SLUSA must be dismissed" as they are necessarily based on precluded state law); *Sofonia v. Principal Life Ins. Co.*, 465 F.3d 873, 876 (8th Cir. 2006) (listing elements for removability, including basis in state law); *Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395

the decisions of those courts are entirely consistent with this Court's decision in *Kircher*.

For these reasons, the Court should not depart from its rule that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Rule 14.1(a); *see also Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1322 n.16 (2016); *Glover v. United States*, 531 U.S. 198, 205 (2001). To the extent this Court's detailed discussion of SLUSA's removal provision in *Kircher* needs further clarification, the Court should await a case where the issue was raised below and where its decision is necessary to the outcome.

II. Section 77p(c) only authorizes removal of precluded state-law actions.

Should the Court address the issue raised by the Acting Solicitor General, the Court should confirm that it meant what it said in *Kircher*. There, the Court recognized that, under a "straightforward reading" of section 77p, "removal and jurisdiction to deal with removed cases is limited to those precluded by the terms of subsection (b)." 547 U.S. at 643. Thus, although petitioners are correct that "preclusion and jurisdiction are two different things," Pet. Br. at 13, 43, this Court has already explained that SLUSA was designed so that the preclusion and jurisdictional provisions apply to the same set of claims. The text and structure of the statute compel this reading, particularly in light of this Court's traditional view that removal statutes are to be strictly construed against federal jurisdiction. *See, e.g., Breuer v. Jim's Concrete of Brevard, Inc.*, 536

F.3d 25, 33 (2d Cir. 2005), *vacated on other grounds*, 547 U.S. 71 (2006) (same); *Behlen v. Merrill Lynch*, 311 F.3d 1087, 1092 (11th Cir. 2002) (same).

U.S. 691, 697 (2003); *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 32 (2002) *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 109 (1941).

Indications of Congress's purposes confirm this straightforward reading. The legislative history demonstrates that Congress intended SLUSA's amendments to the 1933 Act's long-standing anti-removal provision to do only one thing: allow defendants to remove those state law-based class actions "set forth in subsection (b)," 15 U.S.C. § 77p(c), so that a federal court can determine whether they are precluded. *See also Kircher*, 547 U.S. at 646. Accordingly, actions arising solely under the 1933 Act are not removable pursuant to section 77p(c).

A. The plain language of section 77p indicates that only certain state-law class actions are removable.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012) (internal quotation marks omitted). This canon is particularly applicable here, as section 77p(c) is one of three interrelated, mutually cross-referencing provisions. Taken together, these three provisions show a broad *bar* on removal, which has been amended by SLUSA to create a narrow carve-out for a subset of actions that is coterminous with those that contain claims that the statute precludes.

The first of these provisions is the longstanding "removal bar," 15 U.S.C. § 77v(a)—a member of "a rather exclusive club of federal non-removal provi-

sions"—that was enacted in 1933. Jeffrey T. Cook, *Recrafting the Jurisdictional Framework for Private Rights of Action Under the Federal Securities Laws*, 55 Am. U. L. Rev. 621, 633 (2006). As amended by SLUSA, the relevant passage in section 77v(a) states:

> Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.

The SLUSA-added section 77p(c) (the "removal provision"), in turn, cross-references subsection 77p(b), and states that:

> Any covered class action brought in any State court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).

Finally, subsection 77p(b) (the "preclusion provision") provides:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging —
>
> (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

The preclusion provision thus "sets forth" a defined set of covered class actions containing state statutory or common law claims, and precludes those claims. The removal provision provides that this same set—and only this same set—of precluded class actions is removable. *See Kircher*, 547 U.S. at 642 ("we read authorization for the removal in subsection (c), on which the District Court's jurisdiction depends, as confined to cases 'set forth in subsection (b)'"). And the amendments to the removal bar were necessary to eliminate any conflict and make clear that class actions containing the newly precluded, removable claims, are not subject to the removal bar.[6]

The government's novel position—that section 77p(b) does not preclude state-court actions based solely on the 1933 Act but section 77p(c) nonetheless makes those actions removable—has no basis in the statutory text and is inherently contradictory. The only removable cases are "covered class action[s]

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[6] No one, including the government, argues that allowing removal of state cases that are based *exclusively* on the 1933 Act is necessary to give meaning to this addition of the phrase "except as provided in section 77p(c)" to section 77v(a). As petitioner's *amici* and respondent note, section 77p(c) authorizes removal of "mixed" cases—those alleging both precluded state-law claims and 1933 Act claims. *See* Brief for Former SEC Commissioners at 14 n. 4; Brief of Alibaba Group at 5; Respondent's Br. at 17; *see also In re Tyco Int'l., Ltd.*, 322 F. Supp. 2d 116, 120 (D.N.H. 2004) ("SLUSA's amendment to § 77v ... was needed to eliminate any doubt about the removability of cases that include both state law claims and otherwise nonremovable claims based on the Securities Act"). Together, the provisions give defendants the option to have a federal forum decide whether and to what extent state-law claims are precluded when a "mixed" class action case asserting both covered state-law claims and federal 1933 Act claims is filed in state court.

brought in any State court involving a covered security, *as set forth in subsection (b)*" (emphasis added). The most natural reading of the term "as set forth in subsection (b)" is that the universe of removable actions under 77p(c) is coextensive with those subject to "subsection (b)." And to be subject to subsection (b), a suit must meet three criteria: it must (1) be a "covered class action" as that term is defined in 15 U.S.C. § 77p(f)(2); (2) be based upon state or local law; and (3) allege claims of untruth or deception. If the presence of all three criteria are prerequisites to coverage by subsection (b), they are logically also necessary to qualify under the narrow exemption of subsection (c).

The government conceded that satisfaction of each of these criteria is required for purposes of preclusion under subsection (b), and thus that subsection (b) applies only to actions "brought under state law, and [] has no meaningful application" to suits brought solely under the 1933 Act. U.S. CVSG Br. at 7. Yet the government proceeded to argue that section 77p(c) is somehow "best understood" to apply to actions that meet only the first and third of these criteria. *Id.* at 14.

The phrase "as set forth in subsection (b)," however, cannot logically be read to selectively incorporate only *some* of the elements from section 77p(b). Indeed, the government does not explain how the text does so, and to suggest that the "based upon state or local law" requirement does not apply "entirely ignores half of the provision." *Parker v. Nat'l City Corp.*, No. 1:08 NC 70012, 2009 WL 9152972, at *5 (N.D. Ohio Feb. 12, 2009) (interpreting section 77p(c)). If the phrase "as set forth in subsection (b)" incorporates the criteria of subsection (b) into subsection (c)—as everyone seems to agree—it must incorporate all of them. *Cf. Kircher*,

547 U.S. at 643 ("We do not read statutes in little bites.").

The final clause of section 77p(c) is strong evidence that although preclusion and jurisdiction are distinct concepts, Congress intended to tie the two together here. The clause thus further illustrates the error of the government's reading. *Cf. United Sav. Assn. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme ... because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."). The final clause specifies that, upon removal, cases removed pursuant to section 77p(c) "*shall be subject to* subsection (b)"—*i.e.*, dismissed as precluded. Yet the government does not argue that, if a class action asserting only 1933 Act claims is removable, a federal court may, or must, dismiss the 1933 Act claims as precluded. *Cf.* Pet.'s Br. at 17 ("The preclusion provision addresses *state-law* covered class actions[.]") (emphasis in original). And any such argument would find no support in the legislative history, which offers no evidence that, in enacting SLUSA, Congress intended federal courts to dismiss 1933 Act claims. Indeed, that notion is contrary to the purpose of the preclusion clause.

In its petition-stage brief, the government did not address the statutory consequence of reading section 77p(c) to allow removal of actions alleging only 1933 Act claims—that is, that those claims would then be subject to dismissal as "precluded." But if the Court were to abandon the straightforward reading of the statute as to which actions are removable, it would need to undertake interpretative gymnastics to give

some other meaning to the "shall be subject to subsection (b)" language of section 77p(c). The more reasonable approach is to construe the scope of the removal clause based on its plain language. *See, e.g., Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."); *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible.").

B. The statute's plain language is consistent with congressional intent to link preclusion and removal jurisdiction.

As the Court unanimously recognized in *Kircher*, a plain-meaning, logical reading of section 77p(c) produces no internal inconsistencies:

> A covered action is removable if it is precluded, and a defendant can enlist the Federal Judiciary to decide preclusion, but a defendant can elect to leave a case where the plaintiff filed it and trust the state court (an equally competent body, see *Missouri Pacific R. Co. v. Fitzgerald*, 160 U.S. 556, 583 (1896)) to make the preclusion determination.

547 U.S. at 646.

Petitioners acknowledge the correctness of *Kircher*'s point, noting that section 77p(c) was adopted "just in case state courts are not faithful to [the] preclusion provision ... allowing the preclusion determination to be made by the federal court." Pet. Br. at 7;

see also id. at 17; Shannon Rose Selden, *(Self-) policing the Market: Congress's Flawed Approach to Securities Law Reform*, 33 J. Legis. 57, 79 (2006) ("Congress (and the corporate lobby) feared that if class actions alleging state fraud claims were preempted but not removed, extensive litigation over whether or not the claims were covered could still continue in state court."); A.C. Pritchard, *Constitutional Federalism, Individual Liberty, and the Securities Litigation Uniform Standards Act of 1998*, 78 Wash. U. L.Q. 435, 490 (2000) (noting removal of precluded state law actions serves dual purposes: "(1) it allows federal courts to interpret the scope of preemption, thus enhancing uniformity; and (2) it triggers the Reform Act's stay of discovery.").

Under this reading, sections 77p(b) and 77p(c) work together to give defendants an option: remain in state court and move to dismiss any covered state-law claims as precluded, or remove the case to federal court and make a motion to dismiss the covered state-law claims on those grounds. *See Kircher*, 547 U.S. at 646. This case is thus not one where the Court needs to reject a plain-language interpretation of statutory language to give a statutory provision a sensible meaning. *See, e.g., Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976) ("the language of a statute controls when sufficiently clear in its context"). Read to allow removal only of class actions that contain precluded state-law claims, section 77p(c)'s removal jurisdiction plainly serves a purpose—the purpose Congress intended it would serve.

The legislative history confirms that Congress's amendment to the removal bar was linked to the insertion of the preclusion provision. The House Report stated: "This provision is designed to prevent a State

court from inadvertently, improperly, or otherwise maintaining jurisdiction over an action that is preempted pursuant to subsection (b)." H.R. Rep. 640, 105th Cong., 2d Sess. (1998), p. 16. And the Senate explicitly stated that SLUSA was designed "to prevent *state* laws from being used to frustrate the operation and goals of the [PSLRA]." S. Rep. 182, 105th Cong., 2d Sess. (1998), p.2. *See also* H. Conf. Rep. 803, 105th Cong., 2d Sess. (1998), p. 1 (purpose of SLUSA is "to limit the conduct of securities class actions under State law"); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 88 n. 13 (2006) (noting that the "evident purpose" of SLUSA was "to limit the availability of remedies under state law"). There is no indication that Congress intended for section 77p(c) to have any bearing on actions arising solely under federal law claims.

Despite the plain language and clear legislative history, the government argues for a different reading because, in its view, Congress "would not likely have denied defendants access to a federal forum for adjudication of the merits of [] 1933 Act claims." U.S. CVSG Br. at. 14. "But we take the Act as Congress gave it to us, without attempting to conform it to any notions of what Congress would have done." *W. Union Tel. Co. v. Lenroot*, 323 U.S. 490, 501 (1945); *see also Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992). And even looking beyond the statutory text, there is no reason to speculate about what Congress would "likely" have wanted when the legislative history contradicts that speculation. Tellingly, the government's petition-stage brief provided no citation to the legislative record, or any other authority, for its suppositions about what Congress would have

wanted. On the other hand, both logic and the legislative history provide ample reason to believe that Congress wanted to provide for removal as a mechanism for ensuring enforcement of SLUSA's preclusion of covered state-law class actions, without eliminating the longstanding prohibition on removal of 1933 Act claims. *See* Jordan A. Costa, Note, *Removal of Securities Act of 1933 Claims After SLUSA: What Congress Changed, and What It Left Alone*, 78 St. John's L. Rev. 1193, 1218, 1221–23 (2004) (examining potential reasons why Congress in SLUSA did not provide for removal jurisdiction of 1933 Act claims); *see also Christians v. KemPharm, Inc.*, --- F. Supp. 3d ---, No. 3:17-CV-00002, 2017 WL 3017192, at *10 (S.D. Iowa July 17, 2017) (concluding Congress lacked any intent with respect to removal of federal claims).

The context of the removal bar also makes it particularly unlikely that Congress would have created removal jurisdiction for actions containing only 1933 Act claims without explicitly saying so. The removal bar has, since its enactment in 1933, stood out as unusual. *See* Cook, 55 Am. U. L. Rev. at 633. Given the visibility and longevity of the removal bar, it would have been extremely peculiar for Congress to have attempted, for the first time, to provide for removal of purely 1933 Act actions without *any* explicit statement in the statute or any mention of its intentions in the legislative record. *See In re Waste Mgmt., Inc. Sec. Litig.*, 194 F. Supp. 2d 590, 596 (S.D. Tex. 2002) ("More important, there is no express statement by Congress that it was modifying the traditional rule prohibiting removal of cases brought under the 1933 Act. Congress could easily have made a statement in SLUSA expressly modifying this provision had it so intended.").

For eighty years, the removal bar has undisputedly prohibited defendants from removing actions exclusively raising 1933 Act claims to federal court—thereby "den[ying] defendants access to a federal forum for adjudication of the merits of [] 1933 Act claims." U.S. CVSG Br. at 14. In enacting SLUSA in 1998, Congress was well aware of the longstanding removal bar and reaffirmed it except to the extent modified by section 77p(c). "Had Congress intended to authorize the removal of every covered class action involving a covered security, it could easily have provided that 'any covered class action brought in any State court involving a covered security shall be removable.'" *Appert v. Morgan Stanley Dean Witter, Inc.*, 673 F.3d 609, 615 (7th Cir. 2012); *see also Parker*, 2009 WL 9152972, at *3 ("[I]f Congress were attempting to make 1933 Act actions filed in state court removable to federal court, it could not have chosen a more incomprehensible way of doing so."). Congress did not do so, and the Court should not rewrite the statute to effect that result based on the government's speculation.

CONCLUSION

For the foregoing reasons, and the reasons stated in respondents' brief, the decision below should be affirmed.

Respectfully submitted,

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RECORD AND BRIEFS

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CYAN, INC., *et al.*,

Petitioners,

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND NATIONAL VENTURE CAPITAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association representing the interests of more than 650 securities firms, banks, and asset managers. SIFMA's mission is to support a strong financial industry while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. SIFMA works to represent its members' interests locally and globally. SIFMA has offices in New York and Washington, D.C. and is the U.S. regional member of the Global Financial Markets Association. SIFMA also has an office in London and its associated organization, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

Many of SIFMA's members serve as underwriters for, or otherwise participate in, securities offerings and, as such, they have a vital interest in the issues raised by this petition. SIFMA regularly files *amicus* briefs in cases with broad implications for financial markets, and frequently has appeared as *amicus curiae* in this Court. *See, e.g.*, *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318 (2015), *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058 (2014), *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1184 (2013),

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1. Pursuant to this Court's Rule 37.3(a), all parties consent to the filing of this *amici curiae* brief. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Gabelli v. SEC, 133 S. Ct. 2296 (2011), *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011), and *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309 (2011).

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses, trade associations, and professional organizations of every size, in every sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, such as those involving federal securities laws, including *Omnicare, Amgen, Gabelli, Halliburton, Matrixx Initiatives, and Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011), among many others. Many of the Chamber's members are companies subject to federal securities laws that are directly and adversely affected by the California court's decision below.

The National Venture Capital Association ("NVCA") is the venture capital community's flagship trade association, serves as the definitive resource for venture capital data, and unites its member firms through a full range of professional services. NVCA's mission is to foster a greater understanding of the importance of venture capital to the U.S. economy, advocate for policies that strengthen the entrepreneurial ecosystem, and support innovation. Venture capitalists are committed to funding America's most cutting-edge entrepreneurs, working

closely with them to transform breakthrough ideas into emerging growth companies that put innovation in the hands of the public and drive U.S. job creation and economic growth. Often, venture capitalists invest in start-up companies with the hope that, if the start-up is successful, they will be able to take the company public and earn a return on their investment. This common investment strategy, and consequently NVCA's members, would be directly and adversely affected if the Court were to uphold the California decision below because increased state court litigation of federal securities class actions has a potentially chilling effect on the willingness of the companies in which they invest to go public.

The issues raised by this case are of vital importance to *amici* given the increase in state court securities class action lawsuits since the decision in *Luther v. Countrywide Financial Corp.*, 195 Cal. App. 4th 789 (2011) ("*Countrywide*"), and the adverse impact of increased state court litigation of class actions under the Securities Act of 1933 on the competitiveness of the U.S. capital markets.

INTRODUCTION

Almost twenty years after the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") was enacted, *Countrywide* and the decisions that have followed it in California state and federal courts have facilitated a cottage industry of Section 11 federal securities class action lawsuits in California state courts. And, through the use of non-appealable orders to remand federal class action complaints, the lower California federal courts have effectively turned California state courts into a safe

haven for vexatious federal securities class action lawsuits. This shift in federal securities litigation from federal to state courts is exactly what Congress sought to prevent when it enacted SLUSA and provided for exclusive federal jurisdiction for such actions.

In the five years since the California Court of Appeal's decision in *Countrywide*, fifty class action lawsuits alleging claims under the Securities Act of 1933 ("'33 Act") have been filed in California state court. Thirty-five of these cases have been filed in either San Mateo or Santa Clara county state court, in the heart of California's Silicon Valley, and all of these cases have named underwriters as defendants. This exponential growth in litigation and the fear of being haled into state court in California to defend protracted and expensive class action lawsuits threaten to hinder technology start-ups and entrepreneurs in accessing the nation's financial markets to raise the capital they need to launch and grow their businesses. The necessary corollary of this explosive growth of costly and unpredictable state court litigation is to curtail the competitiveness of U.S. markets and force capital-raising overseas.

As Petitioner explains, Congress in SLUSA foreclosed the abusive litigation practices allowed by *Countrywide*, in defiance of SLUSA, and this Court should now confirm that '33 Act class actions are subject to exclusive federal jurisdiction. *Amici* wish to underscore two arguments that support this conclusion.

First, restoring the correct reading of SLUSA furthers the strong federal interests in exclusive jurisdiction over '33 Act class actions. As this Court has recognized,

"[t]he magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 78 (2006). The proliferation of '33 Act class actions in state courts, if left unchecked, will have severe negative consequences for the nation's capital markets. Decisions like *Countrywide* and the rulings below sow uncertainty among issuers and underwriters concerning how the law that governs their conduct will be construed and applied. Increased uncertainty increases the risk to issuers and underwriters of raising capital in the United States, and this increased risk is ultimately passed on to investors in myriad ways. Among other things, enhanced litigation risk artificially depresses capital raising and entrepreneurship, and causes businesses to be wary of going public in the United States, thereby diminishing the strength and reputation of U.S. capital markets. Ultimately, investors pay for the costs of litigation through a lower return on their investments.

Second, only exclusive jurisdiction comports with SLUSA's plain language and purpose. The decision below—like the decision in *Countrywide*—incorrectly reads SLUSA's jurisdictional amendment in a way that renders it superfluous, which is contrary to well-established canons of statutory construction. The decision below also conflicts with Congress's acknowledged intent behind SLUSA—to make "Federal court the exclusive venue for most securities class action lawsuits," H.R. Conf. Rep. No. 105-803, at 13 (1998).

ARGUMENT

I. EXCLUSIVE FEDERAL JURISDICTION OVER '33 ACT CLASS ACTIONS IS VITAL TO PROTECTING IMPORTANT FEDERAL INTERESTS IN THE PROPER FUNCTIONING OF THE U.S. SECURITIES MARKETS.

In a statute that has been law for nearly twenty years, Congress mandated exclusive federal jurisdiction for federal securities class action litigation, including '33 Act class actions. In 1995, Congress passed the Private Securities Litigation Reform Act (the "Reform Act") to "put an end to vexatious litigation that was draining value from the shareholders and employees of public companies." H.R. Rep. No. 105-640, at 9 (1998). When Congress found that "plaintiffs' lawyers [were] circumvent[ing] the Act's provisions by ... filing frivolous and speculative lawsuits in State court, where essentially none of the Reform Act's procedural or substantive protections against abusive suits are available," H.R. Conf. Rep. No. 105-803, at 14-15 (1998), Congress enacted SLUSA in 1998. SLUSA was expressly designed to stem the "shift[] from Federal to State courts" that had resulted from the efforts of plaintiffs' attorneys to evade the Reform Act. Pub. L. No. 105-353, § 2(2), 112 Stat. 3227, 3227, *see also* H.R. Rep. No. 105-640, at 8-9 ("The purpose of [SLUSA] is to prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than in Federal, court.").

Notwithstanding SLUSA's mandate of exclusive federal jurisdiction, in 2011 the California Court of Appeals held in *Countrywide* that concurrent state-court jurisdiction

over class actions under the '33 Act survived SLUSA. 195 Cal. App. 4th at 798 (holding that "concurrent jurisdiction" of '33 Act class actions "survived the amendments to the 1933 Act" as implemented by SLUSA). The California Superior Court's decision here followed *Countrywide* in denying petitioners' motion for judgment on the pleadings for lack of subject matter jurisdiction, explaining that the court's "hands are tied by" *Countrywide*. *See* App'x to Cert. Pet. at 1a, 5a-6a (reprinting unreported decision and transcript of argument below). The decision below is one of many California state and federal court decisions that have followed the faulty analysis of *Countrywide*, exponentially increasing California state-court litigation of '33 Act class actions as a result. In the five years since *Countrywide*, fifty class action lawsuits alleging claims under the '33 Act have been filed in California state court. Thirty-five of these cases have been filed in either San Mateo or Santa Clara county state court, in the heart of California's Silicon Valley, and all of these cases have named underwriters as defendants. By contrast, in the twelve years after SLUSA but before *Countrywide*, only six class actions under the '33 Act were filed in California state courts.

The California decisions ignoring SLUSA have thwarted the will of Congress that exclusive federal jurisdiction over '33 Act claims is essential to safeguarding the strong federal interest, embodied in SLUSA, in maintaining uniformity and integrity in the interpretation and application of the federal securities laws. As this Court has recognized, "[t]he magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 78 (2006).

That is particularly true here. The U.S. securities industry employs over 900,000 people, with that number expected to grow 12% by 2018. *See* SelectUSA, *Financial Services Spotlight*, https://www.selectusa.gov/financial-services-industry-united-states. It raised $2.3 trillion of corporate capital for U.S. businesses in 2015, of which $2.14 trillion came from public debt and equity underwriting—the kind that often attracts '33 Act class actions. *See* SIFMA, *2016 Fact Book*, http://www.sifma.org/factbook/.[2] And, as a percentage of GDP, it contributes more than the entire U.S. agriculture, forestry, fishing, and hunting industry and nearly as much as the entire utilities industry. *See* U.S. Dep't of Commerce, Bureau of Econ. Analysis, *Industry Data*, http://www.bea.gov/iTable/index_industry_gdpIndy.cfm. These figures underscore the important national interest in protecting the securities industry from the uncertainty created by state court concurrent jurisdiction over '33 Act class actions.

Concurrent jurisdiction over '33 Act claims is not sufficient to safeguard these important federal interests. Market participants face significant uncertainty from not knowing which jurisdiction, state or federal, has authority to create precedent for and govern market conduct in accordance with the '33 Act. This uncertainty directly affects those market participants that are frequently named as defendants in '33 Act cases, especially issuers and underwriters, and drives up the cost of raising capital in the United States.

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2. Interestingly, in a year where '33 Act class actions continued to *increase* in state court, the amount of capital raised by the securities industry *decreased* by 1.1% from the prior year. *Id.*

"One of the most dominant criticisms of U.S. capital markets is that the heavily litigious environment imposes significant costs disproportionate to its benefits." Michael R. Bloomberg & Charles E. Schumer, *Sustaining New York's and US' Global Financial Services Leadership* 29 (Jan. 22, 2007). Corporate executives have specifically cited the lack of predictability that arises from the overlapping roles of state and federal courts as a "major reason" why corporations increasingly choose to do business outside the United States. *Id.* at 77; *see also* H.R. Rep. No. 104-50, at 20 (1995) ("Fear of [securities] litigation keeps companies out of the capital markets."); *Commission on the Regulation of U.S. Capital Markets in the 21st Century, Report and Recommendations* 30 (2007) ("[I]nternal observers increasingly cite the U.S. legal and regulatory environment as a critical factor discouraging companies and other market participants from accessing U.S. markets."). As Congress has recognized, the risk of vexatious litigation dampens the ability to raise capital, especially for new and innovative businesses and technologies, and artificially limits access to U.S. capital markets. *See* H.R. Rep. No. 104-50, at 19-20.

These concerns are not merely theoretical. Although around 32% of class action securities complaints are dismissed in federal court, only 6% (three out of fifty) of the '33 Act class action complaints filed in California state court since *Countrywide* have been involuntarily dismissed.[3] And even companies outside of California

3. Priya Cherian Huskins et al., *Guest Post: IPO Companies, Section 11 Suits, and California State Court*, The D&O Diary (Apr. 28, 2016), http://www.dandodiary.com/2016/04/articles/securities-litigation/guest-post-ipo-companies-section-11-suits-and-california-state-court/.

are being targeted in such suits: "For example, Alibaba (a China-based company) and King Digital (an Irish Company) both have Section 11 suits pending in California state courts." *Id.* The lower rate of dismissal in California state court makes these cases significantly more costly to litigate and settle.

Discovery—the main driver of litigation expense in securities class actions—occurs more easily and readily in '33 Act cases filed in state courts. In contrast to federal courts, it is not necessarily the case that the Reform Act's automatic stay of discovery, limitations on recovery of attorney's fees and expenses, and criteria governing selection of lead plaintiffs and their counsel apply in state court. *Compare* 15 U.S.C. § 77z-1 (setting forth federal court protections created by the Reform Act), *with Diamond Multimedia Sys., Inc. v. Superior Court*, 19 Cal. 4th 1036, 1070 (1999) ("Under California law, nothing comparable to the provisions of the Reform Act—intended both to make abusive securities strike litigation more difficult to mount and sustain, and to further the declared congressional policy of a national securities market—would apply to class action securities fraud suits filed in our courts."). Likewise, heightened federal pleading standards separate and apart from the Reform Act may not apply in state court. *See Omnicare*, 135 S. Ct. at 1332 (holding that federal pleading standard of *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), applies to '33 Act claims brought in federal court and that meeting it "is no small task for an investor"). Congress passed SLUSA to prevent plaintiffs from "circumvent[ing] the [Reform Act's] provisions by ... filing frivolous and speculative lawsuits in State court, where essentially none of the [statute's] procedural or substantive protections against

abusive suits are available." H.R. Conf. Rep. No. 105-803, at 14-15 (1998). Knowing all this, class action plaintiffs' attorneys continue to corral cases into state court, in direct contravention of SLUSA and other reforms.

Moreover, concurrent jurisdiction fosters wasteful, duplicative litigation. Only in federal court can multiple and overlapping securities actions be consolidated before a single judge for coordinated handling, thereby preventing duplicative discovery and inconsistent rulings on legal and factual issues. Under the rule dictated by *Countrywide* and the decision below, however, nothing stops plaintiffs from prosecuting parallel class actions in state and federal court. Indeed, *Countrywide* has even created situations where litigation in state and federal courts over the same facts and same claims yields vastly different results: the claims are dismissed in federal court, whereas those same claims are sustained and allowed to proceed to costly discovery and potential trial or settlement in state court. For example, in '33 Act class action litigation filed in federal and state court challenging Sunrun Inc.'s initial public offering, a federal district court dismissed the complaint with prejudice, whereas a California state court overruled defendants' demurrer and allowed the case to proceed to discovery, even though both the federal and state cases involved the same claims and parties and arose from the same transaction. *Compare Greenberg v. Sunrun Inc.*, 233 F. Supp. 3d 764 (N.D. Cal. 2017) (Breyer, J.) (dismissing complaint), *with In re Sunrun Inc. S'holder Litig.*, No. 538215, Order dated Jan. 17, 2017 (overruling demurrer and setting a discovery conference). Companies, their directors, and securities industry participants are forced to defend sprawling federal securities litigation in state court—under one set of pleading, discovery, and

class administration rules—and in federal court—under another. Issuers and underwriters, in turn, are forced to pass this extra expense on to the marketplace. Permitting competing state court litigation increases the costs of entry to the U.S. capital markets for issuers and forces investors to bear higher costs to compensate for soaring expenses.

In sum, concurrent jurisdiction over '33 Act class actions and the many problems it creates undermine the proper functioning of U.S. capital markets. If concurrent jurisdiction over '33 Act claims is permitted to continue, the severe negative consequences on the nation's capital markets discussed above will only worsen. The strong federal interests in safeguarding the integrity of the U.S. capital markets support reversal here.

II. THE DECISION BELOW CONFLICTS WITH THE LANGUAGE AND INTENT OF SLUSA.

The decision below—like the decision in *Countrywide*—ignores the canon of statutory construction requiring that "legislative enactments should not be construed to render their provisions mere surplusage." *Dunn v. CFTC*, 519 U.S. 465, 472 (1997); *see also Corley v. United States*, 556 U.S. 303, 314 (2009) (holding that "one of the most basic interpretative canons" is that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant" (internal quotations and citations omitted)).

SLUSA's jurisdictional amendment provides that state courts have concurrent jurisdiction over actions alleging '33 Act claims "except as provided in [Section 16] with

respect to covered class actions." 15 U.S.C. § 77v(a). The California lower court decisions read the jurisdictional amendment's insertion of "except as provided in [Section 16] of this title with respect to covered class actions" to mean that only state law claims precluded by Section 16(b) and removable under Section 16(c) are no longer subject to state court concurrent jurisdiction. But this interpretation renders the jurisdictional amendment superfluous because Section 16(b) and Section 16(c) already have that effect. Construing the provision as the lower courts did ignores the language of the jurisdictional amendment, which provides that, "with respect to covered class actions," jurisdiction over '33 Act claims should not be concurrent.

Reading the statute to eliminate concurrent state court jurisdiction over '33 Act claims is consistent not only with rules of statutory construction, but also with Congress's purpose as reflected in SLUSA itself. *See Stone v. I.N.S.*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."). Congress enacted SLUSA after evidence emerged that the procedural protections of the Reform Act were causing plaintiffs to flock to state courts to pursue class action claims. While the Reform Act "sought to prevent abuses in private securities fraud lawsuits," "since enactment of that legislation, considerable evidence has been presented to Congress that a number of securities class action lawsuits have shifted from Federal to State courts." SLUSA, Pub. L. 105-353, 112 Stat. 3227, § 2(1)-(2). Further legislation was required to allow the Reform Act to "fully achiev[e] its objectives." *Id.* § 2(3). Accordingly, SLUSA was enacted to make "Federal court the exclusive venue for most securities class action lawsuits," H.R. Conf. Rep. No. 105-803, at 13, under both

the '33 and '34 Acts. Allowing securities class actions alleging exclusively federal securities claims to proceed in state court is an incongruous result that turns SLUSA on its head. There can be no rationale for such a result, and Congress certainly did not intend it.[4]

4. Although *amici* believe that exclusive federal jurisdiction best serves the language and intent of SLUSA, at a minimum the Court should ensure that adequate access to a federal forum for '33 Act class actions exists by adopting the United States' position that removal of such actions is permissible under 15 U.S.C. § 77p(c).

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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Petitioners,

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, *et al.*,
Respondents.

On Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District

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QUESTION PRESENTED

The Private Securities Litigation Reform Act of 1995 ("Reform Act") amended federal securities laws to curb abuses of the class action device that were negatively impacting the national securities market. Three years later, to prevent plaintiffs from circumventing the Reform Act by filing class actions in state court, the Securities Litigation Uniform Standards Act ("SLUSA") *inter alia* amended the Securities Act of 1933 ("1933 Act") to remove state-court subject matter jurisdiction over certain "covered class actions."

In this case, Respondents filed a class action in California state court alleging only federal-law claims under the 1933 Act. The question presented is as follows:

Whether state courts lack subject-matter jurisdiction over covered class actions that allege only 1933 Act claims.

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15 U.S.C. § 78u-4(a)(1) 12

15 U.S.C. § 78u-4(a)(3) 11

15 U.S.C. § 78u-4(a)(3)(B)(ii) 12, 17, 24, 25

15 U.S.C. § 78u-4(b)(1) 12

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Benjamin P. Edwards, *Disaggregated Classes*, 9 VA. L. & BUS. REV. 305, 362 (2015) 25

William S. Lerach & Eric Alan Isaacson, *Pleading Scienter under Section 21D(b)(2) of the Securities Exchange Act of 1934: Motive, Opportunity, Recklessness, and the Private Securities Litigation Reform Act of 1995*, 33 SAN DIEGO L. REV. 893, 894–95 (1996) 31

INTEREST OF AMICUS CURIAE

The Washington Legal Foundation ("WLF") is a nonprofit public-interest law and policy center with supporters in all fifty states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government. To that end, WLF has appeared before this and other federal courts in numerous cases related to the proper scope of the federal securities laws. *See, e.g.*, *Cal. Pub. Emps.' Ret. Sys.* v. *ANZ Sec.*, 137 S. Ct. 811 (2017); *Omnicare, Inc.* v. *Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318 (2015); *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014); *Amgen, Inc.* v. *Conn. Ret. Plans & Trust Funds*, 568 U.S. 455 (2013); *Morrison* v. *Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010); *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008); *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336 (2005).

WLF agrees with Petitioners that SLUSA withdrew state courts' concurrent jurisdiction over covered class actions alleging 1933 Act claims. WLF submits this

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[1] Pursuant to Rule 37.6 of the Rules of this Court, the undersigned state that no counsel for Petitioners or Respondents authored any part of this brief, and no person other than *amicus curiae* or its counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a) of Rules of this Court, letters of consent from all parties to the filing of the brief are on file or have been submitted to the Clerk of the Court.

brief to elucidate the meaning of SLUSA by examining the broader legislative framework within which the statute was designed to operate, and to discuss the policy implications of interpreting SLUSA in a manner that would disrupt and undermine this carefully balanced system.

In particular, WLF believes interpreting SLUSA to permit concurrent jurisdiction over 1933 Act covered class actions would seriously undermine the Reform Act, not only as to 1933 Act claims that Congress intended would be brought in federal court, but also as to related claims under Section 10(b) of the Securities Exchange Act of 1934 ("1934 Act") proceeding simultaneously in federal court. As a practical matter, this would expand the limited, judicially-created private right of action for Rule 10b–5 claims under the 1934 Act. Systemic change on this scale should be implemented, if at all, by Congress and not this Court.

The holding in this case is important to all publicly held companies and their shareholders, who have an interest in maintaining the balanced, fair, and predictable securities litigation system established by the Reform Act. This system would be thrown into chaos if SLUSA were interpreted to permit concurrent state-court jurisdiction over securities class actions under the 1933 Act. WLF is particularly concerned about the impact of this decision on technology and other growth companies, whose volatile stock prices make them especially vulnerable to abusive securities class actions. Many such companies are located in Silicon Valley in

California, where a spate of class actions asserting 1933 Act claims has been filed since the California Court of Appeal issued its decision in *Luther* v. *Countrywide Fin. Corp.*, 195 Cal. App. 4th 789 (2011). *Countrywide* incorrectly held that SLUSA maintained state-court jurisdiction over 1933 Act covered class actions, and that 1933 Act cases filed in state court cannot be removed to federal court. By permitting 1933 Act covered class actions to be filed in state courts subject to a removal bar, *Countrywide* and other California decisions endanger the value of these companies and the interests of their shareholders.

SUMMARY OF ARGUMENT

WLF agrees with the textual arguments advanced by Petitioners in this case. SLUSA's full context reinforces them. SLUSA is one piece of a multipart and interconnected regulatory scheme governing securities litigation. WLF submits this brief to clarify the meaning of SLUSA by examining the broader legislative framework within which the statute was designed to operate.

SLUSA was designed to prevent plaintiffs from circumventing the Reform Act, which in turn was designed to discourage the filing of abusive, unmeritorious class actions resulting in extortionate settlements—to the ultimate detriment of shareholders and the economy as a whole. When viewed in that context, it is overwhelmingly clear that SLUSA meant to establish exclusive federal-court jurisdiction over virtually all securities class actions, and thereby

maintain a system in which related claims are consolidated and heard in the same federal forum at the same time, governed by the consistent standards established by the Reform Act.

The proper interpretation of SLUSA becomes even more clear upon examining the practical consequences of upholding *Countrywide*. The same class of plaintiffs commonly asserts closely related claims for violation of Sections 11 or 12(a)(2) (under the 1933 Act) and Section 10(b) (under the 1934 Act). These claims often challenge the very same allegedly false or misleading statements, and by definition involve identical class-wide causation issues. The Reform Act and SLUSA envision that these intimately related claims will be consolidated and heard in the same federal forum, and would be subject to the "uniform standards" applied by all federal courts.

But under the interpretation of SLUSA adopted by *Countrywide*, plaintiffs can decide to split the Section 11 and 12(a)(2) claims from the 10(b) claims, filing the former in state court while the latter proceed in federal court. Because *Countrywide* holds that a removal bar applies to securities class actions filed in state court, the 1933 Act claims *cannot* be consolidated with related 10(b) claims and *must* proceed in different courts, heard by different judges, subject to different procedural standards and pleading rules. This results in wasted judicial resources, inconsistent results, and undue burdens on parties that must defend themselves on multiple fronts in already-expensive litigation. More importantly, concurrent jurisdiction is antithetical to

SLUSA's stated purpose of preventing circumvention of the Reform Act and establishing a system of "uniform standards" governing class actions involving nationally traded securities.

Concurrent jurisdiction of 1933 Act claims would have broad ramifications for 1934 Act claims as well. Under *Countrywide*'s interpretation of SLUSA, not only would the Reform Act's protections be inapplicable to Section 11 and 12(a)(2) claims filed in state courts, but its consolidation and lead-plaintiff appointment procedure, automatic discovery stay, and heightened pleading standards would also be seriously undermined as to any related Section 10(b) claims proceeding simultaneously in federal court. For instance, the automatic stay of discovery in a Section 10(b) case becomes a weaker shield against abusive lawsuits when discovery can proceed full bore in a closely related state-court case. Likewise, plaintiffs who file their Section 11 and 12(a)(2) claims in state court do not have to hand control of the lawsuit to the lead plaintiff who is the "most adequate" class representative, and can more easily avoid the requirement of pleading claims that sound in fraud with particularity.

Thus, interpreting SLUSA to allow for concurrent jurisdiction of 1933 Act claims would undermine the Reform Act in a far-reaching way that Congress could not have intended. In practical effect, allowing for concurrent jurisdiction would expand the Rule 10b–5 implied right of action beyond the limited scope Congress understood it to have. *See Stoneridge Inv.*

Partners, LLC v. *Scientific-Atlanta*, 552 U.S. 148, 165–66 (2008) ("[W]hen [the Reform Act] was enacted, Congress accepted the * * * private cause of action as then defined but chose to extend it no further."). This would be a drastic shift. Absent a clear directive otherwise, this Court should decline to upset the carefully balanced securities litigation framework that Congress created and sought to reinforce by enacting SLUSA.

ARGUMENT

I. THE FEDERAL SECURITIES LAWS TOGETHER ESTABLISH A SYSTEM OF "UNIFORM STANDARDS."

A. The Securities Litigation System Was Designed to Balance Investor Protection and Avoidance of Vexatious Lawsuits.

This Court has observed that "[t]he magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 78 (2006). Because of this market's importance to the overall health of our economy, Congress enacted a comprehensive legislative framework designed to "insure honest securities markets and thereby promote investor confidence." *Chadbourne & Parke LLP* v. *Troice*, 134 S. Ct. 1058, 1067 (2014) (citation omitted). The success of this system depends on balancing the goal of preventing

corporate fraud with the need to protect against "open-ended litigation [that] would itself be an invitation to fraud." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 760–61 (1975) (Powell, J., concurring). Maintaining this balance is especially important because it is shareholders who "ultimately bear the burden" of meritless litigation. *Id.* at 761 n.5.

To understand SLUSA, it is necessary to examine the statute in the context of this broader framework. The Securities Act of 1933 and the Securities Exchange Act of 1934 were enacted in response to the stock market crash of 1929 and the resulting Great Depression. *Dabit*, 547 U.S. at 78. These statutes have "anchored federal regulation of vital elements of our economy." *Ibid.* Their basic purpose is "to protect investor confidence in the securities markets" by making it unlawful to engage in fraud or deceit in connection with the purchase or sale of securities. *Chadbourne*, 134 S. Ct. at 1060.

The key provisions of the 1933 Act are Section 11, which establishes that any purchaser of a security may bring a private action for damages against the issuer if the registration statement is false or misleading (15 U.S.C. § 77k), and Section 12(a)(2), which similarly establishes a private right of action against any person who offers or sells a security through a prospectus or oral communication that is false or misleading (15 U.S.C. § 77l). Until SLUSA was enacted in 1998, Section 22 barred removal to federal court of 1933 Act claims filed in a court of "competent jurisdiction." 15 U.S.C. § 77v(a).

The key provision of the 1934 Act is Section 10(b), which, along with Securities and Exchange Commission (SEC) Rule 10b–5 promulgated thereunder, broadly prohibits deception, misrepresentation, and fraud "in connection with the purchase or sale of any security" based on any public corporate statement. 15 U.S.C. § 78j; 17 C.F.R. 240.10b–5. The 1934 Act established that federal courts have exclusive jurisdiction over cases brought pursuant to the statute. 15 U.S.C. § 78aa(a).

B. The Limited Implied Private Right of Action Under Rule 10b–5 Is a Key Component of the Balanced System.

Unlike Sections 11 and 12(a)(2), Section 10(b) of the 1934 Act does not expressly establish a private right of action. However, federal courts soon began to recognize that Rule 10b–5 impliedly creates one. *See Kardon* v. *Nat'l Gypsum Co.*, 69 F. Supp. 512, 513–14 (E.D. Pa. 1946). Over the next 25 years, the implied private right of action was recognized by an "overwhelming consensus of the District Courts and Courts of Appeals," and was endorsed by this Court in 1971. *Blue Chip Stamps*, 421 U.S. at 730 (citing *Superintendent of Ins.* v. *Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971)).

But this Court has repeatedly declined to expand the scope of the implied private right of action—which it has described as "a judicial oak which has grown from little more than a legislative acorn"—largely due to policy concerns related to the danger that Rule 10b–5 will be used as a vehicle for particularly vexatious litigation. *Id.* at 737; *Dabit*, 547 U.S. at 80 (2006). In *Blue Chip*

Stamps, this Court held that standing to bring a private action for damages under Rule 10b–5 is limited to actual purchasers or sellers of securities. In declining to expand the private right of action to other plaintiffs, the Court cited the "widespread recognition that litigation under Rule 10b–5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." 421 U.S. at 739. For one thing, "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial"; for another, the "potential for possible abuse of the liberal discovery provisions of the Federal Rules of Civil Procedure may likewise exist in this type of case to a greater extent than they do in other litigation." *Id.* at 740–41. The Court in *Blue Chip Stamps* gave considerable weight to these policy concerns in declining to expand the private right of action precisely because that right is judicially recognized, not expressly created by Congress. "Given the peculiar blend of legislative, administrative, and judicial history which now surrounds Rule 10b–5," the Court concluded, "practical factors" are "entitled to a good deal of weight." *Id.* at 749.

In 1994, the Court once again declined to expand the private right of action, holding in *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), that plaintiffs may not maintain an aiding and abetting suit under Rule 10b–5. The Court noted that aiding and abetting violations are remediable in actions brought by the Securities Exchange

Commission (SEC), but that permitting private parties to sue secondary actors for aiding and abetting "exacts costs that may disserve the goals of fair dealing and efficiency in the securities markets," including those associated with the unpredictable nature of liability in such cases. *Id.* at 183, 188–89. And once again, the Court cited the particular danger of vexatious litigation under Rule 10b–5, observing that the heavy defense costs incurred by professionals accused of aiding and abetting may, perversely, be ultimately borne "by the company's investors, the intended beneficiaries of the statute." *Id.* at 189.

C. The Reform Act Restored Balance to the System.

By the 1990s, private securities litigation had gotten out of control, and the system was no longer achieving the "balance" that Justice Powell cautioned was necessary to give effect to the language and purpose of the federal securities laws. *Blue Chip Stamps*, 421 U.S. at 760–61 (Powell, J., concurring). The class action mechanism had enabled plaintiffs' lawyers to file abusive "'strike' suits" targeting deep-pocketed defendants, often on behalf of "'professional' plaintiffs" with only nominal holdings in the company. S. Rep. No. 104-98, at 4 (1995); H.R. Rep. No. 104-369, at 31–32 (1995) (Conf. Rep.). Congress found that these abuses resulted in extortionate settlements, chilled discussion of issuers' future prospects, and deterred qualified individuals from serving on boards of directors, injuring the "investing public and the entire U.S. economy[.]"

H.R. Rep. No. 104-369, at 31–32 (1995) (Conf. Rep.). Shareholders bear the brunt of these abuses; "[i]nvestors always are the ultimate losers when extortionate 'settlements' are extracted from issuers." *Id.* at 32.

To protect the interests of shareholders and the economy as a whole, and to restore balance to the system to enable it to function fairly and efficiently once again, the Reform Act implemented procedural reforms designed to discourage plaintiffs from filing abusive cases and to encourage defendants to fight abusive cases that are filed. Under the Reform Act, lead plaintiffs asserting 1933 Act or 1934 Act claims on behalf of a class are no longer selected based on who wins the "race to the courthouse"; instead, courts must engage in a process to determine which purported class member is "most capable of adequately representing the interests of class members" as the lead plaintiff. 15 U.S.C. § 78u-4(a)(3); 15 U.S.C. § 77z-1(a)(3); *see* H.R. Rep. No. 104-369, at 33 (1995) (Conf. Rep.). This discourages plaintiffs' lawyers from filing class actions on behalf of "professional plaintiffs" who receive a "bounty for their services" and have no real interest in the outcome of the litigation. H.R. Rep. No. 104-369, at 33 (1995) (Conf. Rep.). Congress understood that plaintiffs with more significant holdings—principally institutional investors—would exercise more control over class counsel, thereby improving the quality of the representation to the benefit of all shareholders. *Id.* at 34.

Naturally, Congress intended for the most adequate

lead plaintiff to represent the class as to *all* its related securities claims. The Reform Act accordingly amended both the 1933 Act and the 1934 Act to require courts to make the lead-plaintiff determination *after* deciding any motions to consolidate, and that a single "most adequate plaintiff" must be appointed as the lead plaintiff for *all* consolidated actions. 15 U.S.C. § 78u-4(a)(3)(B)(ii); 15 U.S.C. § 77z-1(a)(3)(B)(ii).

In addition, the Reform Act imposes heightened pleading standards requiring plaintiffs to plead falsity, materiality, and scienter with particularity as to each statement challenged under Section 10(b). 15 U.S.C. § 78u-4(b)(1)–(2). Likewise, Congress understood that the Federal Rules of Civil Procedure would apply to Section 11 and 12(a)(2) claims under the 1933 Act[2]—including Rule 9(b)'s requirement that claims that "sound in fraud" be pled with particularity. *See infra* at 29–30. The heightened pleading requirements, which require plaintiffs to plead with particularity each statement alleged to have been misleading and the reasons why it is misleading, were meant to make it easier for courts to dismiss unfounded fraud allegations. H.R. Rep. No. 104-369, at 41 (1995) (Conf. Rep.).

As a complement to the heightened pleading standards, which encourage defendants to seek dismissal of unmeritorious claims at the pleading stage,

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[2] Both the 1933 Act and the 1934 Act provide that the Reform Act's provisions apply to class actions brought "pursuant to the Federal Rules of Civil Procedure." 15 U.S.C. § 77z-1(a)(1); 15 U.S.C. § 78u-4(a)(1).

the Reform Act also amended both the 1933 Act and the 1934 Act to establish an automatic stay of discovery while any motion to dismiss is pending. 15 U.S.C. § 78u-4(b)(3)(B); 15 U.S.C. § 77z-1(b). The automatic stay enables defendants to seek dismissal of unsupported claims before having to face "fishing expeditions" or exorbitant discovery costs. H.R. Rep. No. 104-369, at 37 (1995) (Conf. Rep.). Prior to the Reform Act, plaintiffs were able to file lawsuits without even knowing the basis for their own claims, and could "search through all of the company's documents and take endless depositions" in an effort to find one. *Ibid.* (internal quotation marks omitted). The high costs associated with responding to such invasive discovery often coerced defendants into settling even frivolous lawsuits. *Ibid.* By disallowing these abusive discovery practices, the Reform Act's discovery stay essentially requires plaintiffs to have a valid basis for their claims *before* filing a lawsuit, which discourages "strike suits."

D. The Reform Act Accepted the Implied Private Right of Action as Then Defined.

The Reform Act's provisions were designed to apply to private securities class actions whether they asserted 1933 Act claims (pursuant to that statute's express right of action) or Section 10(b) claims (pursuant to the judicially implied right of action). In passing the Reform Act, Congress "accepted the § 10(b) private cause of action as then defined but chose to extend it no further." *Stoneridge*, 552 U.S. at 166 (2008).

This Court has since repeatedly declined to expand the private right of action beyond its scope as understood by Congress, noting that it is a "judicial construct" that "should not be extended beyond its present boundaries." *Id.* at 164–65. In *Stoneridge*, the Court declined to extend the private right of action to reach participants in a "scheme" to violate Section 10(b) who themselves made no misleading statements. The Court held that the SEC's enforcement power may reach such actors, but that allowing them to be sued in a private action creates a "risk that the federal power would be used to invite litigation" that would apply to "the entire marketplace in which the issuing company operates." *Id.* at 161–62. This would expose more defendants to the extensive discovery, uncertainty, and disruption that "allow plaintiffs with weak claims to extort settlements from innocent companies." *Id.* at 163–64. Exercising restraint in considering the scope of the private right of action, the Court explained, is appropriate in light of the Reform Act's heightened pleading standards and other requirements, which "touch upon the implied right of action" and caution against expansion. *Id.* at 165–66.

Likewise, in *Janus Capital Grp., Inc.* v. *First Derivative Traders*, the Court declined to extend the private right of action to apply to persons merely "involved in preparing" allegedly false or misleading statements, in accordance with the "narrow scope that we must give the private right of action." 564 U.S. 135, 144, 148 (2011). Again, the Court pointed out that suits against such secondary actors can be brought by the SEC, but that expanding the private right of action

would "create the broad liability that we rejected in *Stoneridge*." *Id.* at 143, 146.

As illustrated by the history of post-Reform Act decisions concerning the private right of action, this Court shares and has addressed Congress's concern that securities class actions present a particular danger of vexatiousness leading to coerced settlements. Preserving the limited scope of the private right of action is necessary to keep these risks in check.

E. SLUSA Was Designed to Prevent Circumvention of the Reform Act.

Congress enacted SLUSA to prevent plaintiffs from circumventing the Reform Act by filing class actions in state court. Prior to the Reform Act, state-court litigation of class actions involving nationally traded securities had been rare. *Dabit*, 547 U.S. at 82. But because the Reform Act made it more difficult for unmeritorious suits to survive past the pleading stage in federal court, it had the "unintended consequence" of "prompt[ing] at least some members of the plaintiffs' bar to avoid the federal forum altogether" by filing class actions in state court instead. *Ibid.* Congress enacted SLUSA to prevent such circumvention of the Reform Act and to ensure that class actions involving nationally traded securities would be subject to "uniform standards" under a single federal framework. H.R. Rep. No. 105-803, at 13 (1998) (Conf. Rep.). SLUSA accomplishes this goal by eliminating state-court jurisdiction over "covered class actions," broadly defined as any damages action on behalf of more than 50 people.

See Brief for Petitioners, pp. 7–8, 10–11, 15–16.

The legislative history of SLUSA makes it abundantly clear that Congress designed the statute to give federal courts exclusive jurisdiction over virtually all private class actions involving nationally traded securities. The House Conference Report explains that SLUSA "makes Federal court the exclusive venue for most securities class action lawsuits." H.R. Rep. No. 105-803, at 13 (1998) (Conf. Rep.). SLUSA's purpose is "to prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than in Federal, court." *Ibid.* These protections include both the substantive and the procedural provisions of the Reform Act, "essentially none" of which apply in state courts. *Id.* at 15.

Notably, Congress expressed particular concern about the "increase in parallel litigation between state and federal courts in an apparent effort to avoid the federal discovery stay or other provisions of the [Reform] Act." *Id.* at 13 (citation omitted). Accordingly, this Court has previously rejected any construction of SLUSA that raises the prospect of "parallel class actions proceeding in state and federal court, with different standards governing claims asserted on identical facts," as this "squarely conflicts with the congressional preference for 'national standards for securities class action lawsuits involving nationally traded securities.'" *Dabit*, 547 U.S. at 86–87 (quoting SLUSA § 2(5), 115 Stat. 3227).

Taken together, the 1933 and 1934 Acts, the Reform Act, and SLUSA create a uniform system in which securities class actions involving the same factual issues are designed to be considered at the same time, in the same federal forum, prosecuted by one lead plaintiff, and subject to the same substantive and procedural standards as established by the Reform Act.

II. *COUNTRYWIDE* DISRUPTS THE SYSTEM IN A WAY CONGRESS COULD NOT HAVE INTENDED.

A. Under *Countrywide*, Related 1933 Act and 1934 Act Cases May Proceed Concurrently in State and Federal Court.

As noted above, when the Reform Act was enacted, class actions asserting claims related to nationally traded securities were nearly always filed in federal court. Congress therefore understood and expected that cases asserting "substantially the same claim or claims arising under" the securities laws would be consolidated in one federal forum using the mechanism provided by Federal Rule of Civil Procedure 42, and the Reform Act requires that these consolidated actions must be controlled by a single lead plaintiff. 15 U.S.C. § 78u-4(a)(3)(B)(ii); 15 U.S.C. § 77z-1(a)(3)(B)(ii). However, according to *Countrywide*, state courts have concurrent jurisdiction over 1933 Act claims—and moreover, a statutory removal bar requires that 1933 Act claims

filed in state court must remain there.[3] 195 Cal. App. 4th at 797–98. Thus, *Countrywide* permits a class action asserting Section 11 or 12(a)(2) claims under the 1933 Act to proceed in state court at the same time that a related Section 10(b) class action is proceeding under the 1934 Act in federal court—even when the claims and the classes asserting them are virtually identical.

Such a system is inherently dysfunctional, and particularly so because Section 11 and 12(a)(2) claims are often closely related to Section 10(b) claims. For instance, plaintiffs alleging false or misleading corporate statements in the context of an initial public offering (IPO) almost invariably challenge these same statements under both Section 11 and Section 10(b). Likewise, the class of purchasers harmed by a stock price drop will be comprised of the same members in both actions. Questions of causation will be common to both actions as well, since the alleged misrepresentations must be causally related to what made the stock price drop. *See infra* at 30.

Congress's vision of a balanced, fair, and predictable securities litigation system did not include parallel tracks in which class actions that share so many similarities can be heard in different courts, subject to different standards, with no possibility of consolidation or the appointment of a single lead plaintiff. Indeed, in enacting SLUSA, Congress specifically sought to remove

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[3] The United States argues that 1933 Act cases can be filed in state court and *can* be removed, but its interpretation is unfaithful to the statutory text. *See* Brief for Petitioners at 40–43.

concurrent state-court jurisdiction over securities class actions involving nationally traded securities—and expressed particular concern about "increased *parallel state and federal litigation*" brought by plaintiffs "in an effort to avoid federal discovery stays or to establish alternative state court venues for settlement of federal claims." S. Rep. No. 105-182, at 3 (1998) (emphasis added) (citation omitted).

The solution, Congress determined, was to "mak[e] Federal court the exclusive venue for most securities class action lawsuits" in order to "prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing in State, rather than in Federal, court." H.R. Rep. No. 105-803, at 13 (1998) (Conf. Rep.). Indeed, Congress specifically identified the limited exceptions to exclusive federal jurisdiction under SLUSA—and 1933 Act claims brought in state court are not among them.[4]

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[4] The exceptions are:

> (1) certain actions that are based upon the law of the state in which the issuer of the security in question is incorporated, (2) actions brought by States and political subdivisions, and State pension plans * * *; and (3) actions by a party to a contractual agreement (such as an indenture trustee) seeking to enforce provisions of the indenture. Additionally, the legislation provides for an exception of the definition of 'class action' for certain shareholder derivative actions.

H.R. Rep. No. 105-803, at 12 (1998) (Conf. Rep.) (footnote and paragraph break omitted).

B. Recent Cases Illustrate the Messiness of Concurrent Jurisdiction.

The dysfunction inherent in a system that permits concurrent state and federal jurisdiction is far from hypothetical. Simultaneous state and federal proceedings are increasingly frequent, particularly in California courts, and they are riddled with logistical and substantive problems.

To take an example, in *Altayyar* v. *Etsy, Inc.*, Case No. 15-cv-2785 (E.D.N.Y., filed May 13, 2015), plaintiffs filed a securities class action complaint in federal court against e-commerce giant Etsy, Inc. in connection with Etsy's initial public offering. While motions to appoint a lead plaintiff in the federal action were pending, a different plaintiff filed suit in California Superior Court alleging 1933 Act claims only, on behalf of essentially the same class, in connection with the same alleged conduct. The defendants removed the state action to federal court and moved to transfer it to the Eastern District of New York—where Etsy is headquartered, most of the conduct at issue took place, and nearly all documents and witnesses were located—for potential consolidation with the 1934 Act case. *See Cervantes* v. *Dickerson et al.*, Case No. 15-cv-3825 (N.D. Cal., filed Aug. 20, 2015). But the district court granted the state plaintiff's motion to remand the California action, and the defendants were left litigating essentially the same claims in two different fora, before two different decisionmakers, with two different sets of procedural rules.

As one might expect, this created a host of inefficiencies for both the courts and the litigants. For the first few months, discovery in the federal action was stayed under the Reform Act, even as discovery moved forward in the state proceeding. Defendants eventually convinced the California court to stay the state proceedings on *forum non conveniens* grounds, allowing the federal case to take the lead. This led the state plaintiffs to seek to intervene in the federal action, asking the federal court to stay the *federal* case in favor of the California action or, alternatively, to re-litigate appointment of the lead plaintiff in the federal suit so that the state plaintiff could participate. The federal court denied the motion to intervene, and a few months later granted the defendants' motion to dismiss the federal action in its entirety with prejudice. That decision is now on appeal, while the state court case remains active. Messy, highly inefficient parallel proceedings of this type delay the litigation process, waste judicial resources, subject defendants to inconsistent discovery obligations, and carry a high risk of inconsistent results.

In some cases—particularly where the parallel proceedings move at vastly different speeds—they also allow 1933 Act cases in state court to drive the results in related 1934 Act cases in federal court. For example, Pacific Biosciences of California was sued in connection with its initial public offering in five different actions at the end of 2011. Three of these were 1933 Act cases consolidated in California Superior Court; the other two, alleging 1933 and 1934 Act claims, were filed and

consolidated in federal court. *See In re Pacific Biosciences of Cal. Inc. Sec. Litig.*, Case No. CIV 509210 (San Mateo Cty. Sup. Ct., filed Oct. 21, 2011); *Primo* v. *Pacific Biosciences of Cal., Inc.*, Case No. 11-cv-6599 (N.D. Cal., filed Dec. 21, 2011). The consolidated federal action was subject to the Reform Act's discovery stay for the year and a half it took to complete the motion to dismiss process; on April 15, 2013, the court dismissed the federal action in its entirety, giving plaintiffs a month within which to file an amended complaint.

In the meantime, the state court action had advanced through the filing of two amended complaints, a decision on defendants' motions to dismiss, answers to the complaint, some party and third-party discovery, and a mediation resulting in a settlement agreement (though the federal lead plaintiffs were excluded from this process and only informed after the fact). On June 3, 2013, the state court preliminarily approved the settlement and conditionally certified a settlement class that was identical to the class the plaintiffs in the federal suit claimed to represent. One day before the federal amended complaint was due, the defendants moved to stay the federal proceeding—still in the pleadings stage—on the theory that if and when the preliminary state settlement became final, it would extinguish the federal class claims in their entirety. Plaintiffs in the federal action opposed defendants' motion, arguing that the federal court had an obligation to preside over disposition of the 1934 Act claims, over which it had exclusive jurisdiction. Plaintiffs instead

asked the court to enjoin the *state* proceedings, claiming that the parties in the state court action were improperly circumventing the Reform Act's lead-plaintiff provisions and undermining the statutory scheme by seeking to settle the 1934 Act claims in the state forum. The federal court denied both motions to stay; the state court settlement received final approval; and the federal proceeding was voluntarily dismissed a few months later (after a lead plaintiff who had opted out of the state settlement reached his own settlement with defendants).

In short, because the 1933 Act case proceeded under state court rules and was not subject to the Reform Act's automatic discovery stay, it advanced to a point where the parties needed to mediate and settle before the federal court could even decide the motion to dismiss (which it ultimately granted). In a very real way, allowing parallel proceedings of this type strips federal courts of the exclusive jurisdiction and decisionmaking authority over 1934 Act claims that the Reform Act and SLUSA sought to establish.

C. Concurrent Jurisdiction Undermines the Reform Act.

To give proper effect to SLUSA and avoid problems like those outlined above, the Court should consider that upholding *Countrywide* would undermine the Reform Act—as to both 1933 Act cases filed in state court *and* related 1934 Act cases proceeding simultaneously in federal court. It is appropriate for the Court to consider

how the entire securities litigation system, not just SLUSA, was designed to operate. *Cf. Chadbourne & Parke LLP* v. *Troice*, 134 S. Ct. 1058, 1067 (2014) (reading the Reform Act "in light of and consistent with the underlying regulatory statutes").

As discussed below, interpreting SLUSA to allow for concurrent jurisdiction would undo key aspects of the Reform Act by preventing consolidation of related cases and the appointment of a single lead plaintiff; undermining the Reform Act's discovery stay and heightened pleading standards; and in a meaningful sense expanding the implied private right of action under Rule 10b–5 by exposing defendants to more lawsuits based on weaker claims and to the drastically higher costs associated with defending them. In short, the balance that the Reform Act and SLUSA sought to restore to the system would be lost.

1. Concurrent Jurisdiction Prevents Consolidation of Related Cases.

The Reform Act's consolidation and lead-plaintiff appointment process was a centerpiece of the legislation. Congress was deeply concerned that "professional plaintiffs" with no real stake in the company "do not adequately represent other shareholders," and have little interest in exercising oversight over class counsel. H.R. Rep. No. 104-369, at 32–35 (1995) (Conf. Rep.). Congress addressed this problem by mandating that courts "shall appoint the most adequate plaintiff" as lead plaintiff over all consolidated actions. 15 U.S.C. § 78u-4(a)(3)(B)(ii); 15 U.S.C. § 77z-1(a)(3)(B)(ii). This protects

absent class members whose interests are aligned with the lead plaintiff's. For instance, settlements negotiated under the supervision of adequate lead plaintiffs are generally more "'fair and reasonable' than is the case with settlements negotiated by unsupervised plaintiffs' attorneys." H.R. Conf. Rep. No. 104-369, at 35 (1995) (Conf. Rep.).

Consolidation is an important step in the lead-plaintiff process, since class members' interests cannot be adequately represented by competing lead plaintiffs in parallel class actions. That is why the Reform Act requires appointment of a lead plaintiff over *all* consolidated actions following adjudication of any consolidation motions. 15 U.S.C. § 78u-4(a)(3)(B)(ii); 15 U.S.C. § 77z-1(a)(3)(B)(ii). Further, "consolidation of enforcement control in a single liability regime without the ability to shift fora" is a critical component of a successful system for securities-fraud deterrence, which was an animating idea behind SLUSA. Benjamin P. Edwards, *Disaggregated Classes*, 9 VA. L. & BUS. REV. 305, 362 (2015). After all, a system in which related cases are not consolidated, and which allows for the possibility of "parallel class actions proceeding in state and federal court," gives rise to "wasteful, duplicative litigation" and "squarely conflicts with the congressional preference for 'national standards for securities class action lawsuits involving nationally traded securities.'" *Dabit*, 547 U.S. at 86–87 (quoting SLUSA § 2(5), 112 Stat. 3227).

But under *Countrywide*, related securities class

actions *cannot* be consolidated in a single forum because SLUSA purportedly bars removal of 1933 Act claims. 195 Cal. App. 4th at 797–98. Indeed, many courts have rejected defendants' attempts to remove 1933 Act claims and consolidate them with Section 10(b) claims proceeding at the same time in federal court. *See, e.g.*, *Cervantes* v. *Dickerson et al.*, Case No. 15-cv-3825 (N.D. Cal., filed Aug. 20, 2015) (1933 Act case remanded in spite of pending motion to transfer to E.D.N.Y where earlier-filed 1934 Act case was being heard); *Buelow et al.* v. *Alibaba Group Holding Ltd. et al.*, Case No. 15-cv-5179 (N.D. Cal., filed Nov. 12, 2015) (1933 Act case remanded even though MDL panel was set to decide within days whether to transfer case to S.D.N.Y. where earlier-filed, consolidated 1934 Act cases were being heard).

Countrywide thus undermines the intent and policy goals behind the Reform Act's consolidation and lead-plaintiff appointment process. Under *Countrywide*, plaintiffs can file wasteful, duplicative, parallel securities class actions in state courts, where the "uniform standards" established by the Reform Act and reinforced by SLUSA do not apply. *See In re Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.*, 934 F. Supp. 2d 1219, 1233 (C.D. Cal. 2013) ("The [Reform Act] was designed to reduce abusive filings. * * * Filings in state court are not subject to any of the reforms in that legislation, and so are more likely to permit such abuse."). Fractured class actions not only waste judicial resources and unduly burden

defendants—they can harm absent class members as well. For instance, when cases are not consolidated under the direction of a single lead plaintiff, the lead plaintiffs representing competing classes could end up undermining each other or taking inconsistent positions, to the detriment of class members who lack control over the litigation.

In addition, under *Countrywide*, plaintiffs who file class claims in state court are once again incentivized to "race to the courthouse" regardless of whether they have a genuine interest in the lawsuit, because the Reform Act's lead-plaintiff provisions do not apply in state courts. *See In re Countrywide Fin. Corp.*, 934 F. Supp. 2d at 1233; 15 U.S.C. § 77z-1(a)(1). The consequences of this are felt not only in the 1933 Act case, but also in any simultaneously proceeding 1934 Act case, as is well illustrated by Etsy's experience. *See supra* at 20–21. Because Section 10(b) claims must be filed in federal court, the "most adequate plaintiff" will have control over those proceedings—including, for instance, deciding whether to settle the case under certain terms. However, an individual investor with no more than a nominal stake in the company can hijack this process by filing a related Section 11 class action in state court. The individual investor, whose interests may not align with those of the class, can then inject himself into the strategic driver's seat, depriving the "most adequate plaintiff" of the power to agree to a strategic course of action—including undermining a settlement that is in the best interests of the class. Congress surely did not

intend to return such power to the hands of "professional plaintiffs."

2. Concurrent Jurisdiction Disrupts Key Procedural Elements of the Securities Laws.

Taken together, the Reform Act and SLUSA prescribe that once related cases are consolidated, they will be subject to the Reform Act's automatic discovery stay and heightened pleading standards of the Reform Act and the Federal Rules of Civil Procedure. But when 1933 Act cases are filed in state court, these important protections are lost. State courts apply their own procedural rules and more relaxed pleading standards to securities class actions—which is precisely why they are attractive venues for plaintiffs seeking to circumvent federal standards. *Supra* at 15–16. Moreover, filing 1933 Act claims in state court seriously undermines the Reform Act as to any simultaneously proceeding 1934 Act claims as well.

State courts often refuse to stay discovery while a motion to dismiss is pending on the grounds that the Reform Act's automatic discovery stay only applies in federal court. *See* Brief for Petitioners at 27; *supra* at 20–23. When facing a Section 11 claim in state court where discovery has not been stayed, defendants are much more susceptible to being coerced into settling unmeritorious claims by unbearable discovery costs—just as they were before the Reform Act was passed. Moreover, when a Section 10(b) class action is proceeding in federal court at the same time, there is a

risk that the Reform Act's discovery stay will lose its teeth in that case as well—as illustrated by the experience of Pacific Biosciences of California. *See supra* at 21–23. Although discovery is stayed as to the 10(b) claim while a motion to dismiss is pending, discovery that is directly related to that claim may move ahead in the state-court 1933 Act case. Defendants then face the same onerous discovery costs that the Reform Act was designed to rein in before they are able to obtain dismissal of a meritless 10(b) claim. This is precisely what the Reform Act and SLUSA are designed to avoid.

A similar incongruity occurs with respect to the standards for pleading a claim under the securities laws, which differ in state and federal courts. At a minimum, Congress understood when it passed the Reform Act that the Federal Rules of Civil Procedure would apply to claims of misrepresentation under the securities laws, as it assumed these claims would be filed in federal court. *Supra* at 12, 17; *see also* H.R. Rep. No. 104-369, at 41 (1995) (Conf. Rep.) (discussing Rule 9(b)'s applicability to allegations of securities fraud). But, as discussed below, *Countrywide* permits plaintiffs to avoid the more demanding federal pleading standards by filing in state courts, which often require no more than notice pleading. This is particularly problematic with respect to Section 11 claims that "sound in fraud," because filing such claims in state court—where they can be alleged separately from claims of fraud under Section 10(b)—makes it easier for plaintiffs to disclaim any reliance on a fraud theory.

Today, it is well established that Section 11 claims under the 1933 Act that sound in fraud are subject to Rule 9(b).[5] Although Section 11 does not necessarily *require* proof of fraud, Rule 9(b) refers to "alleging fraud"—not to causes of action for which fraud is an element. Requiring Section 11 claims that sound in fraud to be pled with particularity prevents plaintiffs from performing an end-run around the pleading requirements by "adding a superficial label of negligence or strict liability." *Cozzarelli* v. *Inspire Pharm. Inc.*, 549 F.3d 618, 629 (4th Cir. 2008). It is often difficult for plaintiffs to plead around their Section 10(b) fraud allegations in framing a Section 11 claim when they are asserting both claims in the same case. After all, the element of loss causation (and its companion defense of negative causation under Section 11) requires that the alleged misrepresentations be causally related to what made the stock price drop. *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 346 (2005); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35–37 (2d Cir. 2009). This means that the essence of the '33 and 1934 Act claims is necessarily the same. Thus, when Section 11 and

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[5] *See, e.g.*, *Silverstrand Inv.* v. *AMAG Pharm., Inc.*, 707 F.3d 95, 102 (1st Cir. 2013); *City of Pontiac Policemen's & Firemen's Ret. Sys.* v. *UBS AG*, 752 F.3d 173, 183 (2d Cir. 2014); *Cal. Pub. Emps.' Ret. Sys.* v. *Chubb Corp.*, 394 F.3d 126, 160–63 (3d Cir. 2004); *Cozzarelli* v. *Inspire Pharm. Inc.*, 549 F.3d 618, 629 (4th Cir. 2008); *Lone Star Ladies Inv. Club* v. *Schlotzsky's Inc.*, 238 F.3d 363, 368 (5th Cir. 2001); *Republic Bank & Trust Co.* v. *Bear Stearns & Co., Inc.*, 683 F.3d 239, 256 n.7 (6th Cir. 2012); *Kennedy* v. *Venrock Assocs.*, 348 F.3d 584, 593 (7th Cir. 2003); *In re Rigel Pharm., Inc. Sec. Litig.*, 697 F.3d 869, 885–86 (9th Cir. 2012); *Wagner* v. *First Horizon Pharm. Corp.*, 464 F.3d 1273, 1277 (11th Cir. 2006).

Section 10(b) claims are asserted in the same consolidated federal case, as contemplated by the Reform Act, Section 11 claims often sound in fraud and so are subject to Rule 9(b).

However, *Countrywide* permits Section 11 claims to be split from 10(b) claims—thus enabling plaintiffs to plead around the sounds-in-fraud rule. As discussed above, if a Section 11 case were filed in federal court and consolidated with the 10(b) case as contemplated by the Reform Act, this would ensure the application of Rule 9(b). This is what Congress intended. Indeed, at the time the Reform Act was passed, the application of Rule 9(b) to securities claims was well-established and has since become nearly uniform. *Supra* at 30 & n.5. Indeed, the Reform Act's pleading requirements for 1934 Act cases arguably codified the standard for pleading falsity adopted by the Ninth Circuit in *In re GlenFed Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994) (en banc), *superseded by statute on other grounds as stated in SEC v. Todd*, 642 F.3d 1207, 1216 (9th Cir. 2011). William S. Lerach & Eric Alan Isaacson, *Pleading Scienter under Section 21D(b)(2) of the Securities Exchange Act of 1934: Motive, Opportunity, Recklessness, and the Private Securities Litigation Reform Act of 1995*, 33 SAN DIEGO L. REV. 893, 894–95 (1996). Congress could not have intended for a class of plaintiffs to be able to split up their Section 11 claims on the one hand, and their Section 10(b) claims on the other, in order to avoid the application of Rule 9(b) to the former.

In many state courts, the pleading standard for

falsity is far lower than the standard established by Rule 9(b), requiring no more than notice pleading. *See, e.g.*, *In re Mobileiron, Inc. S'holder Litig.*, Santa Clara Cty. No. 2015-1-CV-284001, 2016 WL 9137540, at *4 (Oct. 4, 2016) (finding that plaintiffs' Section 11 claim did not sound in fraud and therefore was "subject to the general pleading standard in California"). Worse, as in many states, California's equivalent of Federal Rule of Civil Procedure 8 does not even incorporate the "plausibility" requirement established by *Bell Atlantic Corp.* v. *Twombly*[6] and *Ashcroft* v. *Iqbal*.[7] California courts considering demurrers (the California equivalent of a motion to dismiss) consider the facts alleged in the complaint to be true "however improbable they may be." *See, e.g.*, *Berg & Berg Enters., LLC* v. *Boyle*, 178 Cal. App. 4th 1020, 1034 (2009) (citation omitted). Naturally, this means that significantly fewer Section 11 claims are dismissed at the pleading stage in state courts than in federal courts, as other *amici* have pointed out in support of the Petition for Writ of Certiorari in this matter. *See* Brief of *Amici Curiae* Law Professors in Support of Petitioners filed June 27, 2016, pp. 3–4, 12–13.

3. Concurrent Jurisdiction Effectively Expands the Rule 10b–5 Implied Private Right of Action.

The private right of action applies to claims brought under Section 10(b) of the 1934 Act and Rule 10b–5,

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[6] 550 U.S. 544 (2007).

[7] 556 U.S. 662 (2009).

whereas the SLUSA issue presented by this case on its face involves only 1933 Act claims. But as demonstrated above, 1933 Act and 1934 Act claims are often closely interrelated, and allowing them to proceed simultaneously in state and federal court thwarts the Reform Act's objectives in both cases. A system that permits such concurrent lawsuits has the practical effect of expanding the limited implied right of action for Section 10(b) claims by increasing defendants' exposure to abusive lawsuits and reintroducing the chaos that the Reform Act and SLUSA sought to contain.

This Court has repeatedly declined to expand the private right of action beyond its limited scope, particularly in the wake of the Reform Act. *Supra* at 13–15. In part, this is because the Reform Act's requirements "touch upon the implied right of action * * * ." *Stoneridge*, 552 U.S. at 165. Congress understood the implied right of action to be limited in scope and to be subject to the Reform Act's provisions; in passing the Reform Act, it "ratified the implied right of action" as "then defined" but "chose to extend it no further." *Id.* at 165–66. Consistent with this history, and with the Reform Act's rebalancing of the system to curb vexatious and abusive litigation, the Court "must give 'narrow dimensions * * * to a right of action Congress did not authorize when it first enacted the [1934 Act] and did not expand when it revisited the law.'" *Janus Capital*, 564 U.S. at 142 (quoting *Stoneridge*, 552 U.S. at 167).

As discussed above, permitting plaintiffs to file 1933

Act covered class actions in state court undermines the Reform Act as to both the 1933 Act claims and any Section 10(b) claims proceeding simultaneously in federal court. Contrary to the Reform Act, such cases cannot be consolidated; a single, most adequate lead plaintiff cannot be appointed; the discovery stay becomes less effective in protecting against abusive claims; and the pleading standards can be more easily circumvented. Gutting these key provisions of the Reform Act effectively expands liability for Section 10(b) defendants, who may be forced to defend related litigation on multiple fronts, shoulder enormous discovery costs before the sufficiency of plaintiffs' allegations have been tested, and face inconsistent obligations imposed by different courts.

III. THERE IS NO POLICY RATIONALE SUPPORTING *COUNTRYWIDE*'S READING OF SLUSA.

Not only does *Countrywide* disrupt the uniform system designed by Congress, and undermine Congress's clearly expressed intent in enacting SLUSA, but it is also difficult to imagine a policy rationale for allowing 1933 Act claims to proceed in state court while removing state-court jurisdiction over all other covered class actions. Respondents assert that this is what the text of SLUSA requires, but point to no convincing policy reasons why this would be so.

One conceivable rationale would be to preserve plaintiffs' ability to choose the forum in which they bring suit. This makes sense as to suits brought by individual plaintiffs on their own behalf, and indeed, such suits are

not within SLUSA's definition of a "covered class action" over which federal courts have exclusive jurisdiction. 15 U.S.C. § 77p(f)(2). However, when a lead plaintiff brings a class action as a representative of class members located throughout the country, the lead plaintiff's choice of forum is hardly relevant. *See Lou* v. *Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987) (lead plaintiff's choice of forum is entitled to "minimal consideration"); *In re Warrick*, 70 F.3d 736, 741 n. 7 (2d Cir. 1995) ("the plaintiff's choice of forum is a less significant consideration in a * * * class action than in an individual action").

Another conceivable rationale would be to maintain state courts' position within our federal system. *See* Respondents' Brief in Opposition to Petition for Writ of Certiorari, p. 19. But Congress considered and rejected this rationale when it passed SLUSA. S. Rep. No. 105-182, at 4 (1998) (the Committee acknowledged concerns about the bill being an "affront on Federalism" but "found the interest in promoting efficient national markets to be the more convincing and compelling consideration"). Furthermore, as this Court has noted, the assertion of state-law securities claims was "virtually unheard of before SLUSA was enacted * * * . This is hardly a situation, then, in which a federal statute has eliminated a historically entrenched state-law remedy." *Dabit*, 547 U.S. at 88. Likewise, "[p]rior to the passage of the Reform Act, there was essentially no significant securities class action litigation *brought in State court*." H.R. Rep. No. 105-803, at 14 (1998) (Conf. Rep.) (emphasis added). Given this context, if Congress

had intended to permit state-court jurisdiction over federal securities class action claims, it would have said so explicitly.

Furthermore, interpreting SLUSA to allow for concurrent jurisdiction over 1933 Act claims would have broad, negative policy consequences. As discussed above, allowing for concurrent jurisdiction would subvert the Reform Act by undercutting the procedural protections it provides as to both 1933 Act and 1934 Act claims, and thereby expanding the private right of action as to Rule 10b–5 claims. A return to the pre-Reform Act status quo would throw the national securities market back into chaos, harming public companies, their shareholders, and the U.S. economy as a whole. The only real beneficiaries of this would be plaintiffs' lawyers, who would once again be empowered to file meritless strike suits against deep-pocketed defendants on behalf of "professional plaintiffs" who do not represent the real interests of the most heavily invested shareholders.

CONCLUSION

For the reasons discussed above, WLF respectfully asks the Court to reverse the judgment of the California Court of Appeal, and to hold that SLUSA withdrew concurrent state-court jurisdiction over 1933 Act claims.

Respectfully submitted,

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